

15 C^xe

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

FROM

Michaelmas Term 39 GEORGE III. 1798,

TO

Trinity Term 40 GEORGE III. 1800,

BOTH INCLUSIVE.

WITH TABLES OF THE NAMES OF CASES AND PRINCIPAL MATTERS.

By CHARLES DURNFORD AND EDWARD HYDE EAST,
OF THE TEMPLE, ESQRS. BARRISTERS AT LAW.

*Si quid novisti rectius istis,
Candidus imperti; si non, his utere mecum.*

HOR.

VOL. VIII.

LONDON:

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LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;
FOR J. BUTTERWORTH, FLEET-STREET.

1800.



J U D G E S
OF THE
COURT OF KING'S BENCH
During the Time of these REPORTS.

Right Honourable LLOYD Lord KENYON, Lord Chief Justice.

Honourable Sir WILLIAM HENRY ASHHURST, Knt. (resigned in
Trinity Term 1799.)

Honourable Sir NASH GROSE, Knt.

Honourable Sir SOULDEN LAWRENCE, Knt.

Honourable Sir SIMON LE BLANC, Knt. (appointed in *June* 1799.)

Sir JOHN SCOTT, Knt. Attorney-General, (created a Peer of
Great Britain and appointed Chief Justice of the Common
Pleas in *Trinity* Vacation 1799.)

Sir JOHN MITFORD, Knt. Attorney-General, (appointed in
Trinity Vacation 1799.)

Sir JOHN MITFORD, Knt. Solicitor-General, (promoted in
Trinity Vacation 1799.)

Sir WILLIAM GRANT, Knt. Solicitor-General, (appointed in
Trinity Vacation 1799.)

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C A S E S

1798.

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Thirty-ninth Year of the Reign of GEORGE III.

DOE on the Demise of WILLEY and Another *against*
HOLMES.

Friday,
Nov. 9th.

ON the trial of this ejectment for a house and lands in the city of *Durham* before by Mr. J. *Lawrence*, the question arose on the construction of the will of *T. Randall*, who, after giving some pecuniary legacies, devised thus; "I give and bequeath my freehold house with the appurtenances &c. (the premises in question) and all the furniture thereto belonging to *Elizabeth Gibson*, whom I make executrix of this my last will, *she paying all my just debts and funeral expences and the legacies* before mentioned twelve months after my death; I likewise leave to the said *E. Gibson* all the rest and residue of my personal estate &c". If the devisee, *E. Gibson*, took only an estate for life under the above devise, the plaintiff, who claimed under the heir at law of the deviser, was entitled to recover; if she took an estate in fee, then the plaintiff's claim failed. The learned Judge, before whom the cause was tried, being of opinion that the devisee took a fee by reason of the latter words in the devise "*she paying all my debts &c.*" nonsuited the plaintiff.

Under this devise "I give my house and furniture to *A.* whom I make executrix, *she paying all my debts and legacies*; I likewise leave to *A.* all the rest of my personal estate"; *A.* takes a fee in the freehold.

1798.

DOE dem.
WILLEY
against
HOLMES.

Wood now moved to set aside that nonsuit, contending that the devisee *E. Gibson* only took an estate for life, no words of inheritance being annexed to the devise to her; and though a charge is imposed on her, it is not in respect of the lands particularly, but the charge on her is general, which must be taken to be in respect of the personalty, she being appointed executrix. But

Per Lord KENYON Ch. J. I am clearly of opinion that the direction given at the trial was perfectly right. In cases of this kind, the question has always been whether the charge is to be paid only out of the rents and profits of the estate, or whether it is to be paid by the devisee at all events; in the former case the devisee only takes an estate for life, but in the latter he takes a fee, otherwise he might be a loser by the devise. Here the devisee is bound to pay the debts and legacies at all events, and the charge is thrown on her in respect of the real estate. The personalty is given to her by the next clause in the will.

Per Curiam,

Rule refused.

Friday,
Nov. 9th.

DOE on the Demise of DA COSTA against WHARTON
and DIXON.

In ejectment the person having the legal title must prevail. And therefore a plaintiff, who claims under an *elegit* subsequent to a lease granted to the tenant in possession, cannot recover in ejectment, though he give the tenant notice that he does not mean to disturb his possession only wishing to get into the receipt of the rents and profits of the estate.

IN ejectment for lands in the township and parish of *Lancaster* in the county of *Durham* the plaintiff claimed under an *elegit* against *Wharton*. An objection was taken at the trial by the defendants that *Dixon* the tenant in possession enjoyed under a lease granted to him by *Wharton* prior to the date of the plaintiff's judgment, and therefore that the plaintiff could not succeed in this ejectment. To this it was answered, on the part of the lessor of the plaintiff, that he had given the tenant notice that he did not mean to disturb the tenant's possession (a), his object being only to get into the receipt of the rents and profits of the estate, and that the defendants ought not to be permitted to set up this objection. But *Mr. J. Lawrence*, before whom the cause was tried, was of opinion that the party who had the legal (b) estate must prevail in an ejectment; and that as the tenant's title accrued prior to that of the lessor of the plaintiff, the latter could not succeed in this ejectment. Accordingly the plaintiff was nonsuited.

(a) Vid. *White d. Whatley v. Hawkins*, 4. *Brislow v. Pegge*, ante, 1 vol. 760. n. M. 14 Geo. 3. Bull. N. P. 96., Dougl. 23. (b) Vid. *Doe d. Hodsdon v. Staple*, ante, 2 vol. 684. edit. note to *Keach v. Hall*; and *Doe*

Chambre now, on a motion to set aside that nonsuit, again relied on the practice which (he said) had continued in opposition to this objection; but

The Court were clearly of opinion that the objection taken must prevail; and therefore they

Refused the rule.

1798.
Doe dem.
DA COSTA
against
WHARTON
and DIXON.

CLAYTON *against* BLAKEY.

Friday,
Nov. 9th.

THIS was an action against a tenant for double rent for holding over after the expiration of his term and a regular notice to quit. The first count of the declaration stated a holding under a certain term determinable on the 12th of *May* then past; and other counts stated a holding from year to year, determinable at the same period. It appeared in evidence that the defendant had held the premises for two or three years under a parol demise for twenty-one years from the day mentioned, to which the notice to quit referred; and the statute of Frauds directing that any lease for more than three years not reduced into writing shall operate only as a tenancy at will, it was contended at the trial at the last assizes for *Northumberland* that the holding should have been stated according to the legal operation of it, as a tenancy at will; and as there was no count adapted to that statement that the plaintiff ought to be nonsuited. *Rooke J.* however, considering that it amounted to a tenancy from year to year, over-ruled the objection, and the plaintiff obtained a verdict.

Though by the statute of frauds it is enacted that all leases by parol for more than three years shall have the effect of estates at will only, such a lease enures as a tenancy from year to year.

Wood now moved to set aside the verdict, on the ground of a misdirection, relying upon the positive words of the statute.

Lord KENYON Ch. J. The direction was right; for such a holding now operates as a tenancy from year to year. The meaning of the statute was that such an agreement should not operate as a term: but what was then considered as a tenancy at will has since been properly construed to enure as a tenancy from year to year.

Per Curiam.

Rule refused.

CASES IN MICHAELMAS TERM

1798.

Saturday,
Nov. 10th.

DENT *against* WESTON.

If the fourth day for perfecting bail be the last day of term, and the bail be not perfected before the rising of the Court on that day, an assignment of the bail-bond to the plaintiff in the evening of that day is regular.

MARRAT moved to stay proceedings on the bail-bond for irregularity, the plaintiff having taken the assignment too soon; the exception to the bail being on the 23d June, and the assignment on the 27th, which was not allowing four entire days to perfect the bail.

The writ was returnable Friday after eight days of Trinity, and bail put in on the 20th of June. Exception was taken on the 23d, and notice of justification given for the 25th, when only one of the bail justified, and no other notice was given. On the 27th (being the last day of term) the plaintiff took an assignment of the bail-bond after the rising of the Court, and brought his action thereon.

Conste opposed this motion in the first instance; relying on the circumstance of the assignment having been made on the last day of the term after the rising of the Court, which (he contended) distinguished this from the common case.

Per Curiam. As the fourth day expired on the last day of the term, it was competent to the plaintiff to take an assignment of the bail-bond on that day after the rising of the Court; in which respect this case is distinguishable from the general case where the plaintiff cannot take such assignment before the expiration of the fourth day. The Master has referred us to a case of *Wilson v. Leece*, Mich. Term 17 Geo. 3. B. R. as in point. That was a "Rule to set aside the proceedings on a bail-bond with costs for irregularity. On cause shewn, it appeared that bail had been duly put in and an exception entered on the 16th, the bail ought to have justified on the 20th, the last day of term, which they did not; on which the plaintiff took an assignment of the bail-bond on that day after the rising of the Court, which was holden regular, and the rule was dismissed."

Accordingly on the authority of that case they

1798.

Tuesday,
Nov. 13th.DOE on the Demise of BEAN *against* HALLEY.

ON the trial of this ejectment, which was brought to recover lands at *Monkbill* and *Pontefract* in *Yorkshire*, a special verdict was found, in substance as follows.

S. Fielding, being seised in fee of the premises in question, by will dated the 27th of *February* 1784 devised them to his "nephew *Michael Halley* and his assigns for and during the term of his natural life without impeachment of waste, and from and after his decease to the eldest son of his said nephew *M. Halley* lawfully to be begotten and to the heirs of such eldest son, upon condition that such eldest son be christened and called by the name of *Fielding*, and in default of issue male of his said nephew unto his nephew *S. Bean* and his assigns for his life without impeachment of waste, and from and after his decease to his eldest son lawfully begotten or to be begotten and his heirs, provided such eldest son be christened and called by the name of *Fielding*, and for want of such issue to his (the devisor's) own right heirs." *S. Fielding* by his will gave several pecuniary legacies, and among the rest the sum of 4000*l.* to his nephew *S. Bean*. On the death of the devisor in *March* 1784 *M. Halley* entered, and on the 16th and 17th of *January* 1787 by lease and release he conveyed the premises in question to *J. Lockall*, to make him tenant of the freehold, in order that a recovery might be suffered to the use of *M. Halley* in fee; and afterwards a recovery was suffered, in which *M. Halley* was vouchee. In *January* 1797 *M. Halley* died, never having had any issue male, leaving the defendant his heir at law. *S. Bean* the lessor of the plaintiff is the heir at law of the devisor, and is the devisee named in his will.

This case was first argued in *Easter* term last by *Wood* for the plaintiff and *Chambre* for the defendant; afterwards in *Trinity* term last by *Law* for the former, and now on this day by *Cockell* King's Serjeant for the latter.

Arguments on behalf of the plaintiff. The first devisee in this will, *M. Halley*, took only an estate for life, with a contingent remainder in fee to his eldest son; the recovery which he suffered worked a forfeiture of his own estate for life and destroyed the contingent remainders over, and consequently the heir at law of the devisor is now entitled to recover. That the devisor intended

Under a devise to *A.* for life without impeachment of waste, remainder to his eldest son and the heirs of such eldest son, and in default of issue male of *A.* then to *B.* &c, *A.* takes an estate for life, remainder to his eldest son in tail, remainder to himself in tail.

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against
HALLEY.

to give only an estate for life to *M. Halley* is evident not only from his having limited the duration of that estate in express terms "for and during the natural life of *M. Halley*," but also from the words immediately subjoined, "without impeachment of waste," which words would have been unnecessary if the devisor had intended to give him an estate-tail. The same construction must also be put on this will, if the *general intent* of the devisor be considered. There is no devise in favor of the issue of *M. Halley* generally; the estate is devised after his death to his eldest son and the heirs of such eldest son on condition that such eldest son should take the name of *Fielding*; and by this devise the eldest son would have taken as a purchaser and not by descent. *Archer's case*, 1 Rep. 66; *Clerke v. Day*, Moor 593., and *Cro. Eliz.* 313; *King v. Melling*, 1 Ventr. 235, and 2 Lev. 59; and *Backhouse v. Wells*, 1 Eq. Cas. Abr. 184. pl. 27. If it should be contended on the part of the defendant that *M. Halley* took an estate-tail by reason of the subsequent words "in default of issue male &c.," the answer is that those words only create an estate-tail in favor of the issue (as was said in *Forth v. Chapman*, 1 P. Wms. 667.) and where the meaning of the devisor is that all the issue should take. But that reason is not applicable to the present case, where none of the issue of *M. Halley* (except his eldest son) could take; for on the birth of such son the fee would have vested in him. The devise is to him and his heirs in terms; and it is clear that the devisor did not mean that any other son should take, since the estate is given first to the eldest son of *M. Halley* and his heirs and afterwards to the eldest son of *S. Bean* and his heirs on condition that such eldest sons should take the name of *Fielding* when they should respectively come into possession, but no such condition is imposed on any other son. The words "in default of issue male" were here used only as meaning "in default of his having a son;" for after the subsequent devise to *S. Bean* for life and the same contingent limitation to his eldest son, the devisor added "and for want of *such* issue," which explains and restrains the generality of the former words; it appearing to have been the devisor's intention to give the same estate to the eldest sons of his two nephews. Besides it is a general rule that where an express estate is given it shall not be defeated by subsequent words from which a different estate is only to be implied. *Spalding v. Spalding*, *Cro. Car.* 186; and *Bamfield v. Popham*, 1 P. Wms. 55; in which case Lord Ch. J. *Trevor* said "To raise an estate by impli-

ation contrary to what is before expressed is to say a man thinks differently from what he speaks, which is unnatural and unreasonable." If then *M. Halley* took an estate for life with a contingent limitation to his eldest son in fee if he had one, or if he had no son with a contingent estate for life to *S. Bean &c.*, the recovery suffered by the former destroyed the particular estate and the contingent limitations depending upon it. *Doe d. Brown v. Longmire*, 3 *Wilf.* 237, 241, and 2 *Bl. Rep.* 777; and *Loddington v. Kime*, 1 *Ld. Raym.* 203, and *Salk.* 224; which last case is applicable to every part of the present.

Arguments for the defendant.—Whether this case be considered on reason or on the authority of decided cases, it must be determined that *M. Halley* took an estate-tail in order to effectuate the general intention of the devisor. That general intent was that neither *S. Bean* or any of his children should take any part of the real estate (a legacy of 4000 *l.* having been given to him as a kind of equivalent) until all the male issue of *M. Halley* should be extinct; and to give effect to that intent, *M. Halley* may take an estate-tail by implication under the words "in default of issue male." The estate is given over to *S. Bean* and his eldest son &c only in default of issue male of his nephew *M. Halley*; and the rule of law, established in *Shelley's case* (a) and recognized in a variety of subsequent cases, is that where the ancestor takes an estate of freehold and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs either in fee or in tail, the word "heirs" is a word of limitation of the estate and not a word of purchase. In order to effectuate the general intent of the devisor the Courts have frequently decided that the first taker should have an estate-tail, though by so doing they have defeated a particular intent of the devisor. The Attorney General *v. Sutton*, 1 *P. Wms.* 754; *Langley v. Baldwin*, 1 *Eq. Cas. Abr.* 185. pl. 29; *Robinson v. Robinson*, 1 *Burr.* 38; *Bamfield v. Popbam*, 1 *P. Wms.* 54 (b); *Roe d. Dodson v. Grew*, 2 *Wilf.* 323; and *Doe d. Blandford v. Applin* (c), ante, 4 vol. 82 (d). The observation that the devisor intended to give the estate only to the eldest sons of his nephews, because he directed those only to take the

(a) 1 *Co.* 104. a.

(b) Which Lord *Kenyon* said was wrongly reported in 1 *Salk.* 236.

(c) When this case was cited, Lord *Kenyon* noticed an intimation of a doubt of the propriety of its decision by the present Lord Chief Justice of the Common Pleas in

Burnfall v. Dawy, *Bos. & Pull.* 221; and his Lordship added "But I am still most clearly of the same opinion that I was when that case was determined."

(d) See also *Doe d. Candler v. Smith*, ante, 7 vol. 531.

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Arguments for the defendant.—Whether this case be considered on reason or on the authority of decided cases, it must be determined that *M. Halley* took an estate-tail in order to effectuate the general intention of the devisor. That general intent was that neither *S. Bean* or any of his children should take any part of the real estate (a legacy of 4000 *l.* having been given to him as a kind of equivalent) until all the male issue of *M. Halley* should be extinct; and to give effect to that intent, *M. Halley* may take an estate-tail by implication under the words "in default of issue male." The estate is given over to *S. Bean* and his eldest son &c only in default of issue male of his nephew *M. Halley*; and the rule of law, established in *Shelley's* case (a) and recognized in a variety of subsequent cases, is that where the ancestor takes an estate of freehold and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs either in fee or in tail, the word "heirs" is a word of limitation of the estate and not a word of purchase. In order to effectuate the general intent of the devisor the Courts have frequently decided that the first taker should have an estate-tail, though by so doing they have defeated a particular intent of the devisor. The Attorney General *v. Sutton*, 1 *P. Wms.* 754; *Langley v. Baldwin*, 1 *Eq. Cas. Abr.* 185. pl. 29; *Robinson v. Robinson*, 1 *Burr.* 38; *Bamfield v. Popbam*, 1 *P. Wms.* 54 (b); *Roe d. Dodson v. Grew*, 2 *Wils.* 323; and *Doe d. Blandford v. Applin* (c), *ante*, 4 vol. 82 (d). The observation that the devisor intended to give the estate only to the eldest sons of his nephews, because he directed those only to take the

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HALLEY.(a) 1 *Co.* 104. a.(b) Which Lord *Kenyon* said was wrongly reported in 1 *Salk.* 236.(c) When this case was cited, Lord *Kenyon* noticed an intimation of a doubt of the propriety of its decision by the present Lord Chief Justice of the Common Pleas in*Burnsall v. Davy*, *Bos. & Pull.* 221; and his Lordship added "But I am still most clearly of the same opinion that I was when that case was determined."(d) See also *Doe d. Candler v. Smith*, *ante*, 7 vol. 531.

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name of *Fielding*, is ill-founded; for it is to be taken not as a surname but a christian name, which may be taken by all the sons of the nephews.

Observations in reply.—The defendant's argument is founded on a supposition that the devisor intended to favor the issue male of *M. Halley*, and that that intention will be defeated unless *M. Halley* took an estate-tail: but that very construction will defeat the devisor's intention expressed in positive words, by which an estate in fee is given to the eldest son of *M. Halley*; for *M. Halley* by taking an estate-tail himself may destroy the subsequent remainder to his son. This case is distinguishable from that of *Robinson v. Robinson*; for there the limitation was not to one son, (as here, the eldest son who was to take the name,) but the devisor intended that the sons should all take in succession. With regard to the case of *Langley v. Baldwin*, the intention of the devisor, which clearly was that all the sons of the grandson should take in succession, would have been defeated unless the grandson had taken an estate-tail by implication; because there was only an express limitation to the six eldest sons, and consequently a seventh could not have taken unless the father had taken an estate-tail. On the same principle the case of the *Attorney General v. Sutton* was decided, where an express estate-tail was only limited to the two eldest nephews: besides which, it appears from other parts of the will referred to by Mr. Cox in his notes (a) on that case that an estate-tail was given in express terms to the nephew, *T. Sutton*. But in *Bamfield v. Popham*, where an express estate-tail was limited to each of the sons of the first taker in succession, it was holden that the subsequent words "for want of issue male" of the first taker would not raise an estate-tail in him by implication, because that would control the express estates before limited.

LORD KENYON Ch. J. (after stating the material parts of the special verdict). On the first reading of this will I formed a strong opinion, which has been confirmed on further consideration, that taking the whole will together it was evidently the devisor's intention that all the sons of *M. Halley* should take before *S. Bean* and his issue, and that neither *S. Bean* or any of his children should take until all the male issue of *M. Halley* were extinct. I am glad that this case comes before us in the shape of a special verdict, because any error of ours may be corrected by a superior tribunal.

(a) 1 P. Wms. 756.

The case that has pressed most upon me is that of *Loddington v. Kime*: but in deciding this case I desire to be understood as not breaking in upon the authority of that case at all. Though there was some difference of opinion in that case between two great Judges, Lord Ch. J. *Treby* and Mr. J. *Powell*, the principal point there decided was this, that where there is a contingent remainder with a double aspect, the destruction of the particular estate destroys such remainder. The same point was also determined in *Doe v. Longmire*, with the propriety of which decision I also agree. But the present case is different from either of those.

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I will not go through all the cases on this head, because they were all examined most minutely in that of *Robinson v. Robinson*, which was sifted and considered more than any preceding case. That case was agitated for nearly half a century. It first came on in Sir J. *Jekyll's* time, and was not decided until after Lord *Hardwicke* had left the profession; and though the latter entertained some doubts during its discussion in the House of Lords, he concurred in the unanimous opinion of the Judges delivered by Lord Ch. B. *Parker*. By that case this position is clearly established, that in the construction of a will we must first look to the general intent of the devisor and give effect to that, and if there be a secondary intent which interferes with it, we are to reconcile the whole as far as we can but at all events to give effect to the general intention. In that case the special intent was defeated; the first limitation was to *L. Hicks for life and no longer*; nothing therefore could be more clear than that the devisor only intended to give him an estate for life: yet seeing that that particular intent was inconsistent with the devisor's general intent, which was that the whole line of male heirs of *L. Hicks* should take, the Court thought that they ought in conscience and in law to effectuate that general intent. That case was a stronger case than the present; for by our decision here we shall not violate any particular intent of the devisor. Here the limitations are to *M. Halley for life*, remainder to his eldest son and his heirs (in fee, it is said by the plaintiff's counsel, but to that I do not agree), and in default of issue male of *M. Halley*; then over. It is a clear rule, acted upon at least from Lord *Vaughan's* time, that where there is a devise to *A.* and his heirs for ever, and a subsequent devise to any person who by possibility may be his heir, the word "heirs" must be construed "heirs of the body," and *A.'s* estate reduced to an estate-

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tail. Here therefore if we were construing these words only we should say that the limitation to the eldest son and his heirs is reduced by the subsequent words in "default of issue male of *M. Halley*" to an estate-tail, for he could not die without heirs general so long as there were any descendants of *M. Halley*, unless the father married again and had issue of the half blood; and even that would not get rid of all difficulty; for the subsequent limitation is to *S. Bean*, who was heir of the deviser, and (though it is not so stated, yet probably) he was within the reach of the words "heirs of *M. Halley*." But in deciding this case, I will not abandon the general rule recognized and acted upon in *Robinson v. Robinson*. We have our choice of two constructions to effectuate the deviser's general intent; either to give an immediate estate-tail to *M. Halley*, which would violate the particular intent of the deviser; or (and to which construction I incline) to say that *M. Halley* took an estate for life only, remainder in tail to his eldest son, remainder in tail to the father in order to let in all his issue male. And though the father could not bar the estate-tail to his eldest son by suffering a recovery, yet by coming in as a vouchee under a double voucher he might bar all the remainders over. I have considered this case to the utmost, and am of opinion that this recovery barred the remainders over, and that the defendant is entitled to our judgment.

ASHHURST J. I concur in opinion with Lord *Kenyon* that by the devise in this will *M. Halley* took an estate-tail by implication. The devise in words was to him (the nephew) for life, with a contingent limitation to his eldest son and his heirs, and in default of issue male of his nephew, then over. The nephew *M. Halley* never having had issue, that remainder never took place, and is as if it had never existed; and then the sentence will run thus, "to *M. Halley* for life, and in default of issue male of his said nephew, then over", which would give an estate-tail to the nephew by implication. It appears plainly from the whole texture of the will that the testator's predilection was for the family of *Halley*, and that he did not mean that the family of *Bean* should take any thing but upon failure of issue male in the family of *Halley*; and this construction will best support the general intention of the testator. It was argued that *M. Halley* having an express estate for life given, it shall not be enlarged by implication: but the cases of *Robinson v. Robinson*, and *Bamfield v. Popham*, seem

seem to negative that proposition, and have brought the rule of law back to its natural channel, namely, the general intention of the testator, and freed it from the fetters of technical rules. Therefore I am of opinion that there must be judgment for the defendant; *M. Halley* having barred the limitation over by suffering a recovery.

GROSE J. This case has been argued on its true ground, namely, the intention of the devisor. Now there are some points that are perfectly clear. It is certain that the devisor intended that *M. Halley* should take an estate for life at least; that his eldest son should take either an estate in fee or in tail, and that on failure of issue male of *M. Halley* *S. Bean* should take: but it was his intention that *S. Bean* should not take as long as any issue male of *M. Halley* should be in existence. Then the question is how that intent can be carried into execution. The plaintiff's counsel chiefly relied on the case of *Loddington v. Kime*: but I do not think that that case, when well considered, militates against our decision in this case. There the devise was to *E. Armin* for life, and in case he have any issue male then to such issue male and his heirs, and if he die without issue male then to *B.* and his heirs: the Court held that *E. Armin* took an estate for life, and that the word "issue" was a word of purchase, because it appeared that the devisor intended to use it in that sense. At the same time it must be remembered that that case was founded on a doctrine that was very much controverted in a subsequent case, *Robinson v. Robinson*, where, notwithstanding the first devise was to *L. Hicks for life and no longer*, it was holden that the devisee must take an estate-tail in order to effectuate the general intention of the testator. It is also observable that in the case of *Robinson v. Robinson* the whole intention of the devisor was carried into effect: whereas here, if *M. Halley* took only an estate for life, and died leaving a second son, such second son could not have taken on the death of his elder brother unless the father took either an estate-tail or in fee. But I think that *M. Halley* took an estate-tail, according to the doctrine mentioned in *Robinson v. Robinson*, 1 Burr. p. 41. "that where the issue cannot take an estate-tail without taking it through the father, the father shall have an estate-tail, otherwise not." The cases of *Dodson v. Grew*, and *The Attorney General v. Sutton*, are also very applicable to the present. I doubt whether *M. Halley* took an estate-tail in the first instance, because that would have enabled him to defeat the limitation to his eldest son; and therefore I agree with Lord Kenyon that the way to

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give effect to every part of the will is to decide that the father took an estate for life, remainder in tail to his eldest son, remainder in tail to the father, so that any children that *M. Halley* might have had even by a second ventre might have taken.

LAWRENCE J. It was clearly the devisor's intention that his estate should go to the issue male of *M. Halley* as long as there were any, that on failure of such issue it should go to *S. Bean* and his male issue, and on failure of such issue that it should go to his own right heirs. But according to the plaintiff's construction of this will, almost the whole of this intention might have been defeated; because if the eldest son of *M. Halley* had taken a fee, though but for a moment, and died, all the subsequent remainders would have been defeated, since the estate would then have descended to the right heirs, not of the devisor but, of such eldest son: seeing therefore the consequence of such a construction, and seeing what was the general intention of the devisor, which was that the estate was not to go to *S. Bean* or his issue until all the male issue of *M. Halley* were extinct, I agree with the Court in the construction put on this will. If *M. Halley* had taken an estate-tail at first, it would have enabled him to defeat the limitation to his eldest son: but if he took only an estate for life at first, with remainder to his eldest son in tail, remainder to himself in tail, the devisor's general intention will be effectuated better than by any other construction. It is true that such a construction enabled *M. Halley* to defeat the limitations to *S. Bean* and his issue: but it is better that he should have such a power than the power of defeating the prior limitation to his eldest son, or than that the circumstance of the birth of an eldest son should defeat the subsequent limitations: we shall carry the devisor's general intent into effect further by this than by any other mode of construction. The reasoning in the cases of *The Attorney General v. Sutton* and *Langley v. Baldwin* goes a great way to decide the present case. In the former, where the limitations only extended to the second son of the first devisee *T. Sutton*, it was holden that *T. Sutton* took an estate-tail in order to effectuate the general intent of the devisor, and to let in all the other sons of *T. Sutton*; in the latter, the same point was also ruled, where the limitation stopped at the sixth son; notwithstanding the express devise in both cases, "an estate for life," to the first taker. The case of *Allanfon v. Clitherow*, 1 *Vez.* 26., bears some resemblance to the present: I am aware that it is distinguishable from this case in one respect, it came before the Court of Chancery on a bill praying an execution of the trusts

according to the will; it is however worth referring to as a case on this subject.

Judgment for the defendant.

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THIS was an action on a policy of insurance brought by the plaintiffs, who were commissioners for the disposal of *Dutch* ships and effects detained or brought into the ports of *Great Britain* by virtue of an act of the 35 *Geo. 3. c. 80. s. 21 (a)*, against one of the underwriters. The first count of the declaration stated that his Majesty by virtue of the above-mentioned act on the 13th *June* 1795 by the advice of his Privy Council appointed the plaintiffs commissioners for the purposes mentioned in the act, and authorized them to take all such ships and cargoes &c. into their possession and care, and to manage sell and dispose of the same to the best advantage according to such instructions as they should from time to time receive from his Majesty &c. and in all other respects according to the said act, and also to give such directions respecting the proceeds of the sales as they were by the said act authorized to give; and also granted to them all such powers and authorities, and authorized them to perform all such duties as might be granted or were required to be done by the commissioners to be appointed in pursuance of the said act; and that before the making of the policies after-mentioned certain ships called the *Houghly* &c. with their cargoes, being ships and goods belonging to subjects and inhabitants of the United Provinces coming from certain parts of *Asia* and *Africa* and bound to certain parts of the United Provinces

Commissioners appointed by the Crown under the authority of an act of Parliament which enabled them "to take into their possession and care all *Dutch* ships and effects detained or brought into the ports of *Great Britain*, and to manage sell and dispose of the same to the best advantage according to the instructions they should receive from his Majesty and his Privy Council," may insure in their own names such ships and effects after seizure abroad and while they are in transitu

to this country. A count stating the nature of their trust and averring the interest to be in themselves as commissioners, and another count to the like effect but without any averment of interest at all, were both holden good upon demurrer.

(a) The 21st *s.* of the 35 *Geo. 3. c. 80.* reciting that several ships and vessels belonging to the subjects or inhabitants of the United Provinces, and also other ships and vessels, having on board goods, wares, merchandise and effects, belonging to such subjects, had been or might be thereafter detained in or brought into the ports of this kingdom, and that such cargoes and such ships and vessels might perish and be greatly injured, if some provision were not made respecting the same, enacts "That it shall and may

be lawful for his Majesty by and with the advice of his Privy Council from time to time to grant a commission or commissions under the great seal of *Great Britain* to three or more persons, authorizing them to take such ships and cargoes into their possession and under their care, and to manage, sell, or otherwise dispose of the same to the best advantage, according to such instructions as they shall from time to time receive from his Majesty, with the advice of his Privy Council."

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were by his Majesty's orders seized at sea in their said voyage by the commander of one of his Majesty's ships in order and to the intent that such ships and goods might be brought into the ports of this kingdom, and that the same had been carried into *St. Helena* for the purpose of being brought from thence to some port of this kingdom; that the plaintiffs, being such commissioners afterwards, on the 15th *August* 1795, caused to be made a certain policy of assurance, purporting thereby and containing therein that the plaintiffs by the name firm and description of "The Honorable Commissioners for the Sale of *Dutch* Property" (the same being their usual stile and firm of dealing) as well in their own names as for and in the name and names of all and every other person or persons to whom the same did or might appertain in part or in all did make assurance &c. (here it set forth the policy in the usual terms upon the ships and goods lost or not lost at and from *St. Helena* to *London* and the subscription of it by the defendant). The declaration then averred that if the said ships and goods had arrived at *London* from the said voyage the plaintiffs as such commissioners were and would have been authorized to take them into their possession and under their care, and to manage sell and dispose of the same according to the form and effect of their commission and the act of Parliament, and that they were intended to be brought from *St. Helena* to *London* for those purposes. It then averred that the plaintiffs as such commissioners at the time of the sailing of the said ships from *St. Helena* as after-mentioned and from thence until and at the time of the several losses after-mentioned were interested in the said ships and goods to the amount of the sums insured, and that the said insurance was so made to and for their use benefit and account as such commissioners. It then stated the sailing of the ships from *St. Helena* on the 2d *July* 1795 on the voyage insured, and their subsequent loss by the perils of the sea on the 1st, 5th, 13th, and 20th *September*; and that the plaintiffs as such commissioners sustained an average loss of 40 *l. per cent.*; of all which the defendant had notice. The breach assigned was non-payment.

The second count was to a similar effect, except that in that count it was averred that the interest was in his Majesty on whose account the plaintiffs had caused the insurance to be made; to which the general issue was pleaded.

In the third count it was averred that the interest was in the *Dutch East India* Company, for whose benefit the insurance was made

made by the directions of the plaintiffs. To this there was a plea that the *Dutch East India Company* were alien enemies; and a *non-pros* was entered as to this count.

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The fourth count was in general like the first, but did not aver the interest in any person. It stated that the policy was made by the plaintiffs as such commissioners as well in their own names as for and in the name or names of all and every other person or persons to whom the same did might or should appertain in part or in all. And it also contained this averment, that *the said ships or any of them were not belonging to his Majesty or any of his subjects* before nor at the time of making the policy or at the several times of the losses happening; and that the plaintiffs were the persons who gave the orders and directions to the agent immediately employed to effect the policy.

To the first and fourth counts there was a special demurrer assigning various causes; but the only ones on which there was any argument now were, as to the first count, that it appeared that the plaintiffs as such commissioners as aforesaid had not at the beginning of the adventure &c any insurable interest or concern in the said ships and goods; and also that it was not alleged nor did it appear that the plaintiffs or either of them or any other person or persons whomsoever had at the beginning of the said adventure any insurable interest or concern in the said ships and goods. As to the fourth count, that it did not appear nor was it alleged that the plaintiffs or either of them as such commissioners as aforesaid or otherwise, or any other person or persons whomsoever, had any interest property or concern in the said ships and goods, or in the said insurance. Joinder in demurrer (a).

(a) The policy in this case was declared by a memorandum to be on ships and goods, viz. *Houghly &c. as should be thereafter declared and valued*; and there was an averment in the declaration that notice on the loss which happened to the ships and goods (therein mentioned) arrived in this kingdom before any declaration or valuation was or could be made of the said ships and goods. And one of the causes of demurrer assigned was the want of such declaration or valuation. This was spoken to upon the first argument and it was insisted on as a condition precedent to the plaintiffs' right to recover. But the Court then intimated

an opinion, that as the loss had happened before any declaration of the value could be made, the plaintiffs were excused by the necessity of the case from making any; and that the value must be ascertained upon an average of the value of all the ships. The counsel observed that the plaintiffs might have declared the value according to the truth of the case after the notice of the loss had arrived: but, in deference to the opinion thrown out by the Court, they did not press this part of the argument any further, and it was not spoken to again on the second argument.

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This case was argued in *Trinity* term last by *Giles* in support of the demurrer and *Park* contra, and now by *Law* in support of the demurrer and *Wood* contra.

Arguments in support of the demurrer.

As to the first count, averring the interest in the plaintiffs as commissioners. They had at the time when the insurance was effected only an interest *in expectation* in the ships and cargoes when they should arrive, and no case has yet gone the length of determining that that is an insurable interest. Their authority to manage sell and dispose of the property (in doing which an interest would arise to themselves) was not to commence until the arrival of the property in a *British* port, which event never took place, and consequently their interest never attached: and they are estopped to aver an interest in themselves at the time against that which appears on the record. *Co. Lit.* 352. *b.* In order to found an insurable interest it has always been required that if the right of property in the thing insured were not in the assured, at least he should have the actual possession or control over it; something which he might abandon to the underwriter in case of damage or the loss of the voyage. In *Le Cras v. Hughes* (a), which was an insurance by the captors of prize taken at *Omoa* by his Majesty's forces, there was a present possession in the assured with an inchoate right of property founded on the prize act and the King's proclamation. So in *Grant v. Parkinson* (b), which was an insurance on a valued policy on the expected profits of a cargo of molasses belonging to the plaintiff, who had a contract with Government to supply the army with spruce beer, the insurance was holden good: but there also the plaintiff had an actual property in possession in the subject-matter insured out of which the profits were to arise; in other words the subject-matter itself was of such increased value to the plaintiff in case it had arrived. So in case of a consignment, tried before Lord Kenyon at Guildhall, *Flint v. Le Mesurier* (c), the consignee, who, it was holden might insure his interest in the commissions, had a direct property in the goods themselves. By virtue of the consignment he might have maintained trover for them, or he might have assigned over his interest in the bill of lading. Such an interest was capable of being precisely calculated. But all those cases

(a) *B. R. Easter 22 Geo. 3. Park's Insurance* 307.

(b) *B. R. M. 22 Geo. 3. ib.* 305.

(c) *Ibid.* 3d ed. 268.

differ from the present, where the plaintiffs had neither *jus in re* or *ad rem*. They had no property or right of possession in the goods until their arrival in this kingdom. If before that event any wrong-doer had taken possession of them, they could not have maintained any action to recover them back. This is more like the case of *Lowry v. Bourdieu* (a), which was an insurance on a common bond for 26,000*l.* given by the captain of an *East Indiaman*, payable in the event of the loss of the ship: this the Court held to be a gaming policy, as the assured had no kind of interest in the ship itself, although by the arrival of the ship the captain would have been in a better condition to discharge his obligation. So in *Tonge v. Watts* (b) it was holden that freight could not be insured until the goods were on board the ship, because till then the right to freight does not attach, whatever just expectation there may be of profit from the adventure. In *Kulen Kempe v. Vigne* (c) this Court held that persons interested in the cargo could not insure against the non-arrival of the ship; and yet they were as much interested in the arrival as the plaintiffs were in this case. Persons having property at stake in foreign settlements have a direct interest in the arrival of ships of force sent out for their protection, yet that is not an insurable interest, because not connected with the property in the ships themselves.

Then as to the fourth count, in which no interest is averred in any particular persons; there is this preliminary objection, that it is repugnant in substance and therefore void; for it avers negatively that *none of the ships insured belonged to his Majesty or any of his subjects* (which averment was made in order to take the case if possible out of the 1st sect. of the 19 Geo. 2. c. 37, whereby insurances "interest or no interest" or "without benefit of salvage" to the assurer" on ships or goods belonging to his Majesty or any of his subjects are prohibited); whereas these ships having been seized, as appears upon the record, under his Majesty's orders and being in the immediate custody of his Majesty's officers by whom the seizure was made, were ships and goods belonging to his Majesty. All ships seized either as prize or otherwise under the authority of the Crown belong to the Crown until the property is adjudged to the former owner, or to some other as captor. But at all events it ought to have been specifically averred in this

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(a) *Dougl. oct. ed.* 467.(b) 2 *Stra.* 1251.(c) *Ante*, 1 vol. 304.

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count that there was an interest in some person, especially since the act of the 19 Geo. 2. It was even necessary so to aver before; and that necessity was only obviated or evaded by agreeing to dispense with the proof of interest, to remedy which mischief the statute was made. In *Depaba v. Ludlow* (a) it is indeed said that the words "interest or no interest" or "without further proof of interest than the policy itself" were introduced to obviate the necessity of proving the value: but before that it had been settled in *Goddart v. Garret* (b) in Chancery, that insurances by persons having no interest, though with such words in the policy, were void. Upon inquiry into the precedents (c) before the 19 Geo. 2. it appears that either there was an averment of interest, or words in the policy dispensing with the proof of it, and sometimes both; this with the exception of one in *Clift's Entries* 77. One in 1653, precedents in the Upper Bench, contains a direct averment of interest. Another of *Goram v. Sweeting*, and the same plaintiff against two other defendants, 2 *Saund.* 200. contains the dispensation of proof in the policy; but there also is notice of abandonment stated, which is tantamount to an averment of interest. *Vidian* 26 & 48. sets out precedents of valued policies "without further account"; though the latter also contains an averment of interest in an aliquot part of the ship insured. Another of *Evans v. Lucas* in *Meth. Nov.* 37., and another of *Grantham v. Caryon*, in p. 44., are both "without further account;" notwithstanding which the former contains an averment of interest. In modern times they referred to precedents of Serjeant *Pool's*, one of *Gatton* and another v. *Dickenson* in 1741, where though the policy was without further account, yet there was also an averment of interest. Another from the same book of *Gostlin v. Thorpe* in 1736 where the insurance was on interest or no interest and without further account. Another in 1738 of *Blake* and another v. *Duncalf* contains an express averment of interest in a third person for whose benefit the insurance was effected. All the precedents since the statute contain an averment of interest. The necessity of that act arose from a notion that the Courts of Law thought themselves bound by the agreement of the party to dispense with any other proof of interest than the production of the policy itself. Yet the Courts of Equity would give relief

(a) *Com. Rep.* 360.(b) 2 *Vern.* 269.

(c) This was desired by the Court on the former argument.

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against such agreements where in fact there was no interest, by ordering the policy to be delivered up to be cancelled. The act in form is directed against policies having such clauses: and in order effectually to prevent such insurances, it took away the means of effecting them. But even before this act, it was illegal to insure without interest, where the fact could be proved. Independently of the statute, the insurance as stated in the count is illegal, according to the well-known doctrine (a) that all wagers against the policy of the State are bad. Then as to the general allegation that the insurance was effected by the plaintiffs for and in the names of all persons who might be interested; although it is large enough to comprehend all persons who are in fact interested, yet it was never holden that an insurance purposely made for the benefit of one individual could be transferred by him to the benefit of another not intended to be protected by it at the time. Neither could the insurance under those general words be considered as made for the benefit of the King, in whom no interest is averred in either the first or fourth counts: and it may even be doubted whether such an insurance by individuals in trust for the King could be maintained in law, on account of the dignity of his office. *Hardr.* 468. He does not sue in the name of another in the case of a chose in action assigned to him, but in his own name. *Bro. Abr. Prerog.* 40. Neither can the King have feoffees to his use. *Ib.* 41.

Lord KENYON said there was no doubt but that there might be a trust for the Crown. It was so considered in the great case of *Burgefs v. Wheate*, 1 *Black. Rep.* 123.

Arguments in support of the declaration.

As to the objection to the first count that there was no insurable interest in the plaintiffs; it may be answered that they have an interest in the subject-matter, not indeed for themselves, but as trustees for the public under the act of Parliament, which was passed to secure the property of such persons as should be eventually entitled to it; and it never was doubted but that a trustee might insure for the benefit of his cestui que trust. The statute gives the plaintiffs a power to *manage sell and dispose of* the property when it comes to this kingdom, and the produce is to be disposed of as the King and Privy Council shall direct. In giving this power the Legislature necessarily gave the means of doing whatever was

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(a) Vide *Good v. Elliott*, ante, 3 vol. 693.

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necessary and proper for the security of the property itself, and amongst the rest the authority to insure it. At the time when the insurance was effected the property was in the actual possession of the King's officers, and in transitu to this kingdom, for the purpose of being placed under the superintendence and control of the plaintiffs: they were therefore clearly trustees, having a direct interest in the event of the goods arriving in this country, which were in effect consigned to their care. Their authority did not (as is contended) rest merely in expectancy; for their commission was actually issued at the time of the insurance. The difference, if any, between this case and that of *Le Cras v. Hughes* (a) is in favor of the plaintiffs; for in the latter there was no right whatever in the captors till condemnation; the right was either in the Crown or in the original owners. That was more truly the case of an expected interest, yet it was holden to be insurable. There the contingency was the future condemnation, which was to vest the right; here it was the future arrival which was to give the exclusive possession: the principle of both is the same. But Lord Mansfield there also said that a prize-agent had an insurable interest in his future commission, which is a much stronger case than the present; for such an agent has neither the possession nor the property of the subject-matter. As to the case of *Lowry v. Bourdieu* (b); that was in fact an insurance on a debt; it was clearly therefore a gaming policy. The same answer applies to the case of an insurance on freight where no goods are shipped at the time. This is most like the common case of a consignee, who (it has been holden) may insure his future contingent interest in the arrival of the goods; and there if the goods never arrive his interest does not attach. It is not necessary that the assured should have the legal interest in the goods at the time of such insurance; for suppose they are consigned either to *Hamburgh* or *London* according to future contingent circumstances, yet both correspondents may insure.

As to the fourth count; it does not appear to be necessary, from the course of the precedents, to aver an interest in any person, unless the case falls within the act of the 19 Geo. 2, and that is negatived by the averment in this count. In *Goram v. Sweeting* (c) no interest was averred; and that omission is not supplied by the stipulation in the policy that it shall be without further account; for that only means "further account of the value," and

(a) *Park's Insur.* 307.(b) *Dougl.* oct. ed. 467.(c) 2 *Saund.* 200.

not of the *interest*; and therefore such a stipulation would not have superseded the necessity of averring and proving an interest if that were required by law. Again in the precedent from *Vidian* 48, though it is said that the plaintiff was possessed of an aliquot part of the ship, yet there is no averment of any interest in the goods, and the policy declared on was on both. It is admitted that there is no such averment in the precedent in *Clift's Entries* 77. The case of *Goddart v. Garrett* (a) cannot be accurately reported as to what is there said, that insurances by persons having no interest were void; for in *Assievedo v. Cambridge* (b), which was some years afterwards, the Court held that it was immaterial whether or not the assured were interested in the subject of the insurance; and that determination accounts for the alteration of the law afterwards by the 19 Geo. 2. With regard to the objection of repugnancy in this count, it does not appear to be well founded; for stating that the subject-matter of the insurance was taken by the King's ships is no averment of interest in the King, the property in prize not being altered before condemnation. Therefore at any rate this count may be sustained, where no interest is averred in any particular person, but the insurance is stated to have been made for the benefit of those who should appear to be in fact concerned.

In reply.—It was answered that if the persons procuring a policy to be effected had no interest or authority in the subject-matter of insurance at the time, no subsequent interest or authority could make it good. That the plaintiffs could not in any event maintain their action as trustees for the Crown; because in the first count the interest was expressly averred to be in themselves; and in the fourth count all interest in the Crown is expressly negatived. As to what was said by Lord Mansfield at the end of the *Omoa* case, that a prize-agent might insure his commission, it was at most an obiter dictum, and is contrary to the principle of decided cases, unless such agent were in possession of the bills of lading or some other document of property in the subject-matter.

Lord KENYON Ch. J. When this case was argued on the former occasion, the novelty of it perhaps raised some doubt which required farther examination, but now that we have had an opportunity of considering the case more fully, I have arrived

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(a) 2 Vern. 269.

(b) 10 Mod. 77.

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necessary and proper for the security of the property itself, and amongst the rest the authority to insure it. At the time when the insurance was effected the property was in the actual possession of the King's officers, and in transitu to this kingdom, for the purpose of being placed under the superintendence and control of the plaintiffs: they were therefore clearly trustees, having a direct interest in the event of the goods arriving in this country, which were in effect consigned to their care. Their authority did not (as is contended) rest merely in expectancy; for their commission was actually issued at the time of the insurance. The difference, if any, between this case and that of *Le Cras v. Hughes* (a) is in favor of the plaintiffs; for in the latter there was no right whatever in the captors till condemnation; the right was either in the Crown or in the original owners. That was more truly the case of an expected interest, yet it was holden to be insurable. There the contingency was the future condemnation, which was to vest the right; here it was the future arrival which was to give the exclusive possession: the principle of both is the same. But Lord *Mansfield* there also said that a prize-agent had an insurable interest in his future commission, which is a much stronger case than the present; for such an agent has neither the possession nor the property of the subject-matter. As to the case of *Lowry v. Bourdieu* (b); that was in fact an insurance on a debt; it was clearly therefore a gaming policy. The same answer applies to the case of an insurance on freight where no goods are shipped at the time. This is most like the common case of a consignee, who (it has been holden) may insure his future contingent interest in the arrival of the goods; and there if the goods never arrive his interest does not attach. It is not necessary that the assured should have the legal interest in the goods at the time of such insurance; for suppose they are consigned either to *Hamburg* or *London* according to future contingent circumstances, yet both correspondents may insure.

As to the fourth count; it does not appear to be necessary, from the course of the precedents, to aver an interest in any person, unless the case falls within the act of the 19 *Geo. 2*, and that is negatived by the averment in this count. In *Goram v. Sweeting* (c) no interest was averred; and that omission is not supplied by the stipulation in the policy that it shall be without further account; for that only means "further account of the value," and

(a) *Park's Insur.* 307.(b) *Dougl.* oct. ed. 467.(c) 2 *Saund.* 200.

not of the *interest*; and therefore such a stipulation would not have superseded the necessity of averring and proving an interest if that were required by law. Again in the precedent from *Vidian* 48, though it is said that the plaintiff was possessed of an aliquot part of the ship, yet there is no averment of any interest in the goods, and the policy declared on was on both. It is admitted that there is no such averment in the precedent in *Clift's Entries* 77. The case of *Goddart v. Garrett* (a) cannot be accurately reported as to what is there said, that insurances by persons having no interest were void; for in *Assiveedo v. Cambridge* (b), which was some years afterwards, the Court held that it was immaterial whether or not the assured were interested in the subject of the insurance; and that determination accounts for the alteration of the law afterwards by the 19 Geo. 2. With regard to the objection of repugnancy in this count, it does not appear to be well founded; for stating that the subject-matter of the insurance was taken by the King's ships is no averment of interest in the King, the property in prize not being altered before condemnation. Therefore at any rate this count may be sustained, where no interest is averred in any particular person, but the insurance is stated to have been made for the benefit of those who should appear to be in fact concerned.

In reply.—It was answered that if the persons procuring a policy to be effected had no interest or authority in the subject-matter of insurance at the time, no subsequent interest or authority could make it good. That the plaintiffs could not in any event maintain their action as trustees for the Crown; because in the first count the interest was expressly averred to be in themselves; and in the fourth count all interest in the Crown is expressly negatived. As to what was said by Lord *Mansfield* at the end of the *Omoa* case, that a prize-agent might insure his commission, it was at most an obiter dictum, and is contrary to the principle of decided cases, unless such agent were in possession of the bills of lading or some other document of property in the subject-matter.

Lord KENYON Ch. J. When this case was argued on the former occasion, the novelty of it perhaps raised some doubt which required farther examination, but now that we have had an opportunity of considering the case more fully, I have arrived

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(a) 2 Vern. 269.

(b) 10 Mod. 77.

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at the conclusion (perfectly satisfactory to my own mind) that the claim of the plaintiffs cannot be resisted. When this insurance was effected the ships in question were at *St. Helena* and were soon afterwards to come to this country to the plaintiffs as trustees; the plaintiffs insured in the character of trustees; the underwriters knowing the statute, which had then recently passed, must have known what kind of interest the plaintiffs had in this property; and knowing all this, they took the premium from the plaintiffs considering them as having a right to make the insurance, and when the loss happened they refused to pay what they had engaged to pay, pretending that the plaintiffs had no right to make the insurance. Unconscientious however as this objection so made by the defendant may be, if it be a legal objection, he has a right to insist upon it in a Court of Law. And the first question here is whether or not it has not been decided in cases analogous to the present that this is such an interest as may be insured; I think it has. The ships, having been seized at sea by his Majesty's ships of war for the purpose of being brought to this country, were at *St. Helena*, and were coming here to be under the care management and disposal of the commissioners appointed by the act of Parliament which has been alluded to; having been so seized, they could not come here under any other management or to any other persons than to the plaintiffs, as trustees. Then can a trustee insure? there is no doubt but he may. It was said however in the course of the argument that there cannot be a trustee for the Crown: but that argument was soon abandoned, as untenable; and certainly it cannot be supported. Then can a consignee insure? Surely he may. Can an agent for prizes insure? Certainly; and these plaintiffs are like agents for prizes. I never shall speak lightly of any opinion given by Lord *Mansfield*: whether or not I should agree to every thing that was said in the *Omoa* case I am not now prepared to say, not having heard it argued: when such a case comes before us I shall determine it as well as I can, always giving great weight to the decisions of so able a Judge as Lord *Mansfield*. But with one part of that case I fully concur, and on that no doubt can be entertained, namely, that an agent for prizes, though he has not the possession, has such an interest in the ships coming home that he may insure; and in so deciding, Lord *Mansfield* only proceeded on principles previously settled and established. Therefore as well on the authority of that case as on certain positions which must be admitted on all hands,

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I am of opinion that the plaintiffs are entitled to our judgment on the first count.

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The second question, whether or not the plaintiffs may declare in the manner in which the fourth count is framed, depends (I think) on the construction of the statute 19 Geo. 2. c. 37. Notwithstanding what has been said in the argument on behalf of the defendant, I think that at common law a person might have insured without having any interest. And this is in some measure proved by the case cited from 2 *Vernon*; since that an application was made to the Court of Chancery to have the policy delivered up: for that Court sometimes relieves, as was said by Sir J. Jekyll in *Cowper v. Cowper* (a), against the rigour of the law, when certain circumstances are disclosed to induce that Court so to interfere. But the preamble and enacting part of the stat. 19 Geo. 2. c. 37. remove all doubt on this point. It recites the mischief and inconveniences that had arisen from the making of assurances interest or no interest, and then it enacts (not declaring) that no such assurance shall be made, except in certain cases which for very wise and politic reasons were excepted. Therefore I am satisfied that this count is good, unless it be on an insurance prohibited by that statute. But that statute only applies to "ships belonging to his Majesty or any of his subjects," and does not extend to foreign ships. The defendant's counsel then wished us to consider these ships as belonging to the Government of this country: but that cannot be so considered; for the property in captured ships is not altered before condemnation in the Court of Admiralty.

ASHHURST J. The principal question in this case arises on the fourth count of the declaration, namely, whether or not it can be supported for want of an averment of interest in the plaintiffs in the subject-matter insured; as to which I am of opinion that the declaration is good without such an averment. For in the first place this does not seem to be a case that falls within the purview of the statute against gaming policies. But without entering into that, it does in the present case appear to be sufficiently clear that the plaintiffs were interested. It does not in any case appear to be necessary that there should be any technical form of words made use of by way of averment of interest; it is sufficient if the fact appear to be so. Here was a seizure of enemy's property, and then it vested in the Crown. Suppose the subject of the insurance had been an enemy's ship taken as prize in time of war by a King's ship, and

(a) Vid. 2 P. Wms. 753.

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the captain as such had insured her, I should conceive such insurance would be good, as the matter is of public notoriety, and the underwriters from such a description must have sufficient notice of the property. The information given to the underwriters by the plaintiffs on the face of the present declaration is matter of equal notoriety; for it shews the act of Parliament by which a power and authority was vested in the Crown for the several purposes therein mentioned, and that the plaintiffs were appointed commissioners by the King to take care of such property of a certain description as might come into their hands, and that this was property of that description. This seems to be all that the underwriters could have occasion to know, and that the plaintiffs were in the nature of agents. The plaintiffs did not affect to make this insurance in their own right, but as trustees for those persons who should eventually be entitled to it. Therefore I am of opinion that the declaration is sufficient.

GROSE J. I do not agree with my Brother *Ashurst* in one part of his opinion, namely, that the property in these ships was in the Crown, because the property could not be altered before condemnation.

The first question in this case is, whether or not the plaintiffs had an insurable interest in the ships and goods insured. Now they were either trustees, consignees, or agents, for those who might eventually be entitled to the produce. If they were trustees or consignees, it seems admitted that they might have insured. And if they be considered as agents, then they had an insurable interest, according to the decision in the *Omoa* case. As to the other question; whoever reads the stat. 19 Geo. 2. must see what the law was before the passing of that act. Before that time a wagering policy was not illegal. The words of that statute clearly shew that before that time any person might have insured without interest; therefore it is not necessary to aver interest in any case not prohibited by that act. And this case does not come within the prohibition of that act, because it was an insurance on foreign ships.

LAWRENCE J. With regard to the supposed contradiction on this declaration, the argument is thus; by a reference to the introductory part of the declaration, which applies to all the counts, it appears that the ships and goods were the property of the Crown, and therefore it is a contradiction afterwards to say that they were not the property of his Majesty or any of his subjects. But the foundation of that argument fails; for it only appears that

they were taken by his Majesty's ships and were in the possession of the Crown, without shewing that the Crown had any right to them, which certainly does not amount to an averment that the property was in the Crown; and that which is taken by the Crown not in a state of hostility does not thereby become the property of the Crown. On the other parts of the case, I need only say that I agree with the rest of the Court.

Judgment for the plaintiffs.

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MEUX and others *against* HUMPHRY.

Wednesday,
Nov. 14th.

READER had obtained a rule calling on the plaintiffs to shew cause why the defendant, an insolvent debtor, should not be discharged out of execution for a defect in the note given to him for the weekly payment of 3 s. 6 d. under the Lords' act. The objection was that it was only signed by one of the three plaintiffs, who signed for himself and partners, but it did not appear (it was contended) that they were partners, or that the one who did sign had any authority from the two others to sign for them; and the statute enacts that the debtor shall be discharged "unless such creditor or creditors, who shall have charged any such person in execution as aforesaid, doth or do insist upon such prisoner being detained in prison, and shall agree by writing signed with his or *their* name or names to pay and allow weekly a sum" &c. And the case of the King on the prosecution of *Moore* and Wife and others v. *Wilkinson*, ante, 7 vol. 156. was cited.

When a debtor is in execution at the suit of several plaintiffs on a joint debt, one of them may give a note for the weekly payments of 3 s. 6 d. under the Lords' act, signed by him alone "for himself and partners."

Larves now shewed cause against the rule. The statute has been complied with by one of the plaintiffs having given a note for himself and the other plaintiffs, who appeared on the declaration and by the evidence given at the trial to be partners. It is a valid note against the three plaintiffs, and an action may be maintained upon it against them all. This case is distinguishable from that referred to, where the lessors of the plaintiff were not partners, and where the note was only given by one of the lessors for himself alone, not for himself and the other lessors.

Per Curiam. In the case cited the different lessors of the plaintiff might have been suing on distinct titles, and there the note was only given by one of them for himself. But here a valid note has been given by one of the plaintiffs, partners, for himself and

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the other plaintiffs, which is binding on them all. The Master also informs us, that this is the usual mode in which such notes are given.

Rule discharged.

Thursday,
Nov. 15th.

The KING against J. BROWN.

A commitment in execution of a rogue and vagabond under the 23 Geo. 3. c. 88. should state that the defendant was apprehended with the implements of housebreaking upon him at the time of such apprehension &c.

THE prisoner was brought up by writ of *habeas corpus* directed to the keeper of the house of correction at *Reading*, together with the warrant of his commitment, which was as follows.

"County of *Berks*, to wit; *E. Thornhill* Esq. one of the justices &c. to the constables &c. and keeper &c. These are to command you the said constables &c. to convey and deliver into the custody of the said keeper &c. the body of *James Brown*, being convicted before me by his own confession and otherwise of being a rogue and vagabond within the meaning of an act of Parliament in this case made, at *Wantage* in the said county on the 17th *October* instant, by then and there having upon him many pick-lock keys, two crows, and other implements, with an intent feloniously to break and enter into a dwelling-house there. And you the said keeper are hereby required to receive the said *James Brown* into your custody in the said house of correction, and him there safely to keep until the next General Quarter Sessions of the peace &c."; dated 22d *October*, 38 G. 3.

Erskine and *Lawes* now moved that the prisoner might be discharged out of custody for the insufficiency of the warrant of commitment. The statute 23 Geo. 3. c. 88. which extends the provisions of the general vagrant act of the 17 Geo. 2. c. 5. extends only to persons "apprehended, having upon them any pick-lock &c. with an intent feloniously to break and enter any dwelling-house" &c, which must mean persons having such implements found upon them at the time of their apprehension. Now there is nothing stated in this commitment to shew that the prisoner was apprehended in the predicament mentioned in the act. This cannot be aided by the general vagrant act, grounded on a confession of the prisoner that he is a rogue and vagabond; because it is not a confession of any particular fact which constitutes him such, but of the law itself, and therefore will not conclude the party. They cited *R. v. York* 5 Burr. 2684. and *R. v. Judd*,
ante,

ante, 2 vol. 255., to shew that the warrant must strictly pursue the authority given to the magistrate to commit.

Milles in support of the commitment. The apprehension of the offender is no part of the offence, and therefore need not be stated. It is sufficient, according to *Hawkins*, to state the substance of the offence with convenient certainty. Here it appears that the defendant was found with implements of housebreaking upon him, and that he intended therewith to break open a dwelling-house feloniously at *Wantage* on the 17th of *October*; and that is one of the offences described in the act.

Lord KENYON Ch. J. I yield with great reluctance to the objection; but I am afraid it is well founded.

Per Curiam

Prisoner discharged.

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against
J. BROWN.

WILKS *against* ADCOCK.

Thursday,
Nov. 15th.

THE defendant obtained a rule calling on the plaintiff to shew cause why the bail-bond, given to the sheriff of *Middlesex* in this case, should not be delivered up to be cancelled, on the defendant's entering a common appearance, on account of a defect in the affidavit to hold to bail. It was stated in the affidavit that the defendant was indebted to the plaintiff in 588*l.* and upwards for principal and interest *due upon a bill of exchange or order for 553*l.* 12*s.* drawn by one D. Henshaw upon and accepted by the defendant, payable to the plaintiff or order.* But

The Court (after cause had been shewn against the rule) were of opinion that the affidavit was sufficient for the purpose of holding the defendant to bail, it appearing on the whole of the affidavit taken together that the debt arose on a bill of exchange, which was in substance set forth. And that on a rule of this kind the defendant's counsel could not resort to the declaration (which in argument had been attempted) in order to shew that this was an order only for payment of money and not a bill of exchange. And they

Discharged this rule.

But afterwards the defendant obtained another rule, on reading the declaration and the affidavit to hold to bail, calling on the plaintiff to shew cause why the bail-bond should not be delivered up to be cancelled on the defendant's entering a common appear-

An affidavit to hold to bail stated that the debt arose "on a bill of exchange or order for &c drawn by A. upon and accepted by the defendant, payable to the plaintiff: and upon the affidavit alone the Court refused to order the bail-bond to be delivered up. But the instrument declared upon appearing not to be a bill of exchange, the Court on reading the affidavit and the declaration ordered the bail-bond to be given up, on the defendant's filing common bail.

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ance, on the ground that the defendant had been holden to bail on a bill of exchange and that the plaintiff had afterwards declared upon an order. The declaration stated that *D. Henshaw* on the 21st of June 1797 according to the usage and custom of merchants made his certain bill of exchange in writing, directed to the defendant, requiring him to pay to the plaintiff or order 553 *l.* 12 *s.* "out of the monies which he (the defendant) might receive of *S. Bayard*, American agent, when received, with the lawful interest;" averring that after the making of the said bill &c the defendant had received of *S. Bayard* a large sum of money more than sufficient to pay and discharge the said bill &c.

And for this variance, after cause shewn,
The Court made this

Rule absolute (a).

(a) *Gibbs* and *Onslow* in support of the rules.
Erskine against them.

Thursday,
Nov. 15th.

STEVENSON against CAMERON.

Bail to the sheriff are liable to the plaintiff's whole debt (without regard to the sum sworn to) and costs, provided they do not exceed the penalty of the bail-bond. If the sheriff discharge the defendant without taking a bail-bond, the Court will not permit the latter to file common bail on paying the sum sworn to, if the plaintiff have any claim on him beyond that sum.

THE plaintiff recovered a debt of 84 *l.* 19 *s.* 6 *d.* against the defendant before the Lords of Council and Session in *Scotland*, with 21 *l.* 7 *s.* 6 *d.* for costs: but before the costs were ascertained and the judgment complete the defendant came to *England*, where he was arrested by the plaintiff on an affidavit in which only the sum of 84 *l.* 19 *s.* 6 *d.* was sworn to as the debt. The sheriff discharged the defendant out of custody on his depositing a sum of money as a security without taking any bail-bond; and then the defendant obtained a rule calling on the plaintiff to shew cause why on payment of 84 *l.* 19 *s.* 6 *d.* he should not be permitted to file common bail.

Gurney, in support of the rule, relied on the case of *Jackson v. Hassell* (a), where it was holden that the bail were not liable beyond the sum sworn to and the costs; and on the rule of Court 5 *Geo.* 2., by the express words of which the bail are not answerable beyond that sum.

Marryat contra. This is not an application by the bail but by the defendant himself. As the sheriff has neglected his duty, by discharging the defendant without taking a bail-bond, the plain-

(a) *Dougl.* 330.

tiff ought to be put in the same situation as if the sheriff had performed his duty. Now if a bail-bond had been taken, the *bail to the sheriff* would have been liable to the extent of the penalty of the bail-bond, under which the plaintiff might have recovered his whole debt and costs. *Mitchell v. Gibbons*, 1 *H. Bl. Rep.* 76; and *Orton v. Vincent*, *Cowp.* 71., in which a similar case of *Savage v. West*, 9 *Geo.* 3. is referred to. In this respect those three cases as well as the case before the Court are distinguishable from that cited from *Douglas*, where the question was respecting the extent of the liability of the bail to the *action*. And the rule of Court referred to has, in its construction, been confined to the bail to the *action*. The distinction between the liability of the bail to the sheriff and bail above was recognized in a late case here, *Heppel v. King* (a), where, after an attachment had been granted against the sheriff for not bringing in the body, the Court would only relieve him on paying the whole debt and costs, though he contended that he was only liable to the sum sworn to and the costs. If therefore this rule be made absolute, the plaintiff will be deprived of an advantage to which he would have been entitled if the sheriff had done his duty, namely, a security for his whole debt.

The Court were of opinion that, as the bail to the sheriff (if any had been taken) would have been liable to the whole debt and costs, by reason of the penalty of the bail-bond, the rule ought to be discharged.

Rule discharged.

(a) *Ante*, 7 vol. 370.

The KING *against* The late Sheriff of MIDDLESEX;
in a Cause of TAYLOR v. ODLIN.

Saturday,
Nov. 17th.

THE defendant was arrested in *Trinity* term last; the plaintiff ruled the sheriff to return the writ in the same term, and on the 26th of *June* (the last day but one of the term) ruled him to bring in the body, so that the defendant had until the first day of this term either to justify his bail or to surrender himself in discharge of his bail. No bail were justified; and the defendant did not surrender until the 8th of this month; on the 9th (the following day) an attachment was moved for and obtained against the

If the sheriff be once in contempt for not bringing in the body, that contempt is not purged by the defendant's surrendering on a subsequent day, though before an attach-

ment is moved for against the sheriff.

sheriff

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The KING
against
The Sheriff
of MIDDLE-
SEX.

sheriff for his contempt in not bringing in the body at the return of the rule.

The only question now before the Court was whether the contempt, incurred by the sheriff for not bringing in the body, were purged by the subsequent render of the defendant;

The Court (after consulting the Master on the practice of the Court respecting this point) said that it was not purged; and that in this respect the practice of this Court differed from that of the Common Pleas (a); and they discharged the rule for setting aside the attachment (b).

Espinasse in support of the rule.

Shermer against it.

(a) Vid. *Thorold v. Fisher*, 1 Bl. Rep. C. B. 9.

(b) But see *The King v. The Sheriff of Middlesex*; ante, 7 vol. 527.

Monday,
Nov. 19th.

RANKING and others qui tam against Sir C. MARSH, Knight.

The Court will not permit any amendments to be made in a penal action, where the plaintiff has been guilty of delay in carrying on the suit.

THIS action was brought by the plaintiffs, who are the assignees of *J. Martindale* a bankrupt, for usury charged to have been committed on receiving interest on a bond given by *Martindale* and one *Fitch* to the defendant, *H. Deane*, and *E. Crowe*, on the 24th of *June* 1795, which bond was given in lieu of a former bond, dated 21 *June* 1792, by one *R. Wood*, *Martindale*, and *Fitch*, to the defendant and *H. Deane*. The writ was sued out in *Trinity* vacation 1797 returnable in the *Michaelmas* term following: the declaration was delivered on the 24th of *April* last, whereupon the defendant obtained an imparlance to *Trinity* term last; issue was delivered in that term with notice of trial for the sittings after the term; the record was then carried down for trial, but was withdrawn on account of the absence of a material witness.

In this term the plaintiffs obtained a rule calling on the defendant to shew cause why he should not be at liberty to amend his declaration by stating, in the first count, the defendant's forbearance to *R. Wood*; and, in the other counts, by omitting to state between whom the corrupt contract was made or to whom the forbearance was given. And in support of the rule were cited *Cross v. Kaye*, ante, 6 vol. 543; and *Maddock q. t. v. Hammett Knight*, ante, 7 vol. 55; in the former of which the Court permitted amendments to be made, though the record had been once carried down

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for trial but was withdrawn in order to rectify the mistake. But, after cause shewn,

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The Court said that, as there had been so much delay in this case on the part of the plaintiffs, they ought not in their discretion to permit any amendment to be made. And they

Discharged the rule.

Bayley in support of the rule.

Erskine and *Onslow* against it.

WILSON *against* MARRYAT.

Wednesday,
Nov. 21st.

THE plaintiff declared on a policy of insurance made the 29th of February 1796, and averred to be for the use and benefit of one *John Collet*, upon the *American* ship *Argonaut* and cargo, "at and from *Bordeaux* to *Madeira* and the *East Indies* and back to *America*, with liberty to touch stay and trade at all ports and places wheresoever on her outward and homeward bound voyage."

The declaration then stated that the ship sailed from *Bordeaux*, and that in the course of the voyage insured she was seized and detained by certain officers of the King, by means whereof she became lost to the said *John Collet*. The second count stated a loss by the perils of the sea. The third count was upon a policy made the 28th of May 1796 for the use of *Collet* on the *American* ship *Argonaut* and goods "at and from *Bordeaux* to the *East Indies*, with liberty to touch call and trade at all ports places or islands whatsoever as well at the *Cape* as on this or on the other side of the *Cape of Good Hope*, until her arrival at her port of discharge in *Bengal*." This policy was by a memorandum declared to be on certain wines and brandies specified, warranted neutral; and this count stated a loss by the seizure and detainment of the King's officers in the course of the voyage insured. The fourth count stated the loss to be by the perils of the sea. The fifth count was on a policy dated the 15th of August 1796, effected on account of *Collet* and one *Anthony Butler* on goods warranted *American* on board the said ship *Argonaut* (*American*) "at and from *Madeira* to her last port of discharge in *India*, with liberty to touch stay and trade at all ports places and islands whatsoever and wheresoever as well at the *Cape of Good Hope* as on this or on the other side of it." This count stated the goods to have been

Under the late treaty between this country and the United States of America, it is not necessary that the trade from America to our settlements in the *East Indies* should be direct: it may be carried on circuitously by the way of Europe.

A natural-born subject of this country may also be a citizen of America for the purposes of commerce, and entitled to all the advantages of an American under this treaty: the circumstance of his coming over here for a temporary purpose does not deprive him of those advantages.

If there be any illegality in the commencement

of an integral voyage, and an insurance be effected on the latter part of the voyage, which taken by itself would be legal, still the assured cannot recover on the policy.

shipped

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shipped on board the *Argonaut* at *Madeira* on the 1st of *June* 1796, and a like seizure and detainment by the same persons in the course of the voyage insured. The sixth count stated the loss by the perils of the sea. There were also counts for money paid, and money had and received. The general breach assigned was non-payment.

The defendant pleaded the general issue; and on the trial the jury found a special verdict, which after stating the making of the policies as mentioned in the 1st, 3d, and 5th counts, and for the benefit of the parties therein named, set forth in substance as follows:

The ship *Argonaut* on the 12th of *June* 1795 was purchased at *Philadelphia* in the United States of *America* by *John Collet* and *A. Butler*, who to the time of the loss hereinafter stated continued owners thereof in equal moieties. *Collet* on the 25th of *July* 1795 sailed in the ship as master thereof from *Philadelphia* with a cargo of corn and flour for *France*, with a view of proceeding from thence with the ship after the disposal of her cargo to *Madeira* and the *East Indies*, and from thence back to the United States. Before the ship's departure from *Philadelphia* *Butler* wrote to *Collet* this letter—"Having given you a power of attorney for the complete management of my half of the ship *Argonaut*, her present cargo, and any others you may choose to put on board her, agreeable to your own judgment and will, the following observations are offered solely to assist your reflections, and lead you to procure that information which must be necessary to form a sound judgment how to act. For the employment of the *Argonaut*, three plans occur as probable to be accomplished, viz. First plan; after your arrival in *France* to get a freight to the *Isle of France*, and go from thence to *Bombay*, and get a freight of cotton to *Canton*; from *Canton* to take a freight back to the coast of *Coromandel* or *Malabar*, and in short to keep the ship employed in the country commerce until she has gained sufficient to make a complete investment in *China* for this country. Second plan; to go from *France* to *London* and there obtain a freight for any of the Company's settlements in the *East Indies*, and from such settlement pursue the same plan of operations by country freight, or take a freight direct from *Bengal* for this country, or for *Hamburg*, or other neutral ports. Third plan; to obtain a credit in *London* and go out to *Bombay* or *Bengal* with a complete investment on our own accounts, to obtain a freight to *China*, and with that and the pro-

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ceeds

ceeds of the *English* investment to load at *Canton* for this country, or with the proceeds of the *English* investment to load at *Bengal* for this country directly back, or for *France*." On the 1st of May 1796 *Collet* arrived with the ship at *Brest* in *France*, and there sold the flour which had been laden on board her in *America*, and afterwards proceeded to *Bordeaux* in *France*, where he sold the remainder of the cargo; and certain other goods being the same mentioned in the 3d count and *American* property, belonging to *Collet*, (the United States of *America* not being then at war with any of the Belligerent Powers,) were there purchased and loaded on account of *Collet* on board the ship, which, with the cargo, on the said 1st of May 1796 was in safety at *Bordeaux*. The ship from the time of her first sailing from *America* to the time of the loss continued *American*. Whilst the ship remained at *Bordeaux* *Collet* came from thence to *London*, and having procured a credit with *Wilson* (the plaintiff) the latter under the direction of *Collet* and during his stay in *London* purchased upon commission within this kingdom with the monies or upon the credit of him (*Wilson*) goods of *British* growth and manufacture on account of *Collet* and *Butler*, the same being the goods in the 5th count mentioned, and being the property of *Collet* and *Butler*; and *Wilson* under the like direction of *Collet*, and during his stay in *London*, caused the said goods to be shipped at *London* on the joint account and risk of *Collet* and *Butler* on board three other *American* ships, in which they were conveyed from *London* to *Madeira* in the said policies in the 1st and 5th counts mentioned, for the purpose of being reshipped at *Madeira* into the ship *Argonaut*, and of being carried therein together with the goods so shipped on board her at *Bordeaux* from *Madeira* to the *British* territories in the *East Indies*, and of being imported into those territories and traded with there; and the value of the said last-mentioned goods still remains due from *Butler* and *Collet* to the plaintiff. The ship *Argonaut* on the 1st of May 1796 sailed from *Bordeaux* with the goods so loaded on board her there to *Madeira*, in order to take on board her the goods so shipped from *London*, and having arrived at *Madeira* took on board there as well those goods as certain *Portuguese* wines for the purpose of proceeding with her whole cargo to the *British* territories in the *East Indies* and of landing and trading with the same there; the said goods &c. not being such the importation whereof into the said territories was or is entirely prohibited; and neither *Collet* or the

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said ship having been licensed by the *East India* Company to sail or trade there. The *Argonaut* with her cargo having afterwards sailed from *Madeira* in the prosecution of her said voyage to the *East Indies* in the course of such voyage, to wit, on the 2d of *August* 1796 at *Symon's Bay* near the *Cape of Good Hope* was with her cargo seized and detained by Sir G. K. *Elphinstone* commander of a squadron of the King's ships of war, upon suspicion of being an illicit trader; by means whereof not only *Collet's* moiety of the ship and goods in the 3d count mentioned were lost to him to the amount of the sum insured by him respectively thereon, but also the goods in the 5th count mentioned were lost to *Collet* and *Butler*, who were interested therein to the amount within alleged.

From the time of the ship's departure from *Bordeaux* until and at the time of the seizure of the same *Collet* was master thereof; and two *British* boys, whom *Collet* carried with him from *London* at the solicitation of their friends, were employed on board the ship during the voyage. *Butler* was a natural-born subject of this kingdom, but was resident and domiciled in the State of *Pennsylvania* in *America* before and at the time of the declaration of the independence of the United States, and has ever since continued to be resident and domiciled there; and upon such declaration of independence became and from thence hitherto hath been and still is a citizen of the said United States. *Collet* was also a natural-born subject of *Great Britain*, and long before and until *July* 1784 (being after the ratification of such independence) was a seaman engaged in the navigation of *British* merchants ships. In *July* 1784 he went with his wife and children to settle and permanently reside in the United States of *America*, and then became and was received as a citizen of the same States: he has ever since been domiciled there, and has been from time to time employed in the command and navigation of ships belonging to himself and other persons citizens of the United States. On the 16th of *February* 1793 the proclamation (usually made at the beginning of every war) was made here by the King by the advice of his Privy Council, forbidding all mariners and seafaring men, natural-born subjects of this country, entering or continuing in the service of foreign Princes and States, or serving in any foreign ship or vessel, without the King's special license. *Collet* had not obtained any special license from his Majesty in that behalf.

On the 19th of *November* 1794 a treaty of amity commerce and navigation was signed at *London* on the part of *Great Britain* and the United States of *America*, which, with an additional article thereto subjoined, was ratified and confirmed on the part of the United States at *Philadelphia* on the 14th of *August* 1795, and by his Majesty at *St. James's* on the 28th of *October* in that year; being the same treaty mentioned and referred to in the act of the 37 *Geo. 3. c. 97.* entitled &c. By that treaty it was (amongst other things) agreed (here the several parts of the treaty referred to below (a) were set out: but it was understood that other parts of the

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Article 11th.

(a) "It is agreed between his Majesty and the United States of *America* that there shall be a reciprocal and entirely perfect liberty of navigation and commerce between their respective people in the manner under the limitations and on the conditions specified in the following articles."

Article 12th.

"His Majesty consents that it shall and may be lawful during the time hereinafter limited for the citizens of the United States to carry to any of his Majesty's islands and ports in the *West Indies* from the United States, in their own vessels, not being above the burthen of seventy tons, any goods or merchandizes being of the growth manufacture or produce of the said States, which it is or may be lawful to carry to the said islands or ports from the said States in *British* vessels. And that the said *American* vessels shall be subject there to no other or higher tonnage duties or charges than shall be payable by *British* vessels in the ports of the United States: and that the cargoes of the said *American* vessels shall be subject there to no other or higher duties or charges than shall be payable on the like articles if imported there from the said States in *British* vessels. And his Majesty also consents that it shall be lawful for the *American* citizens to purchase load and carry away in their vessels to the United States from the said islands and ports all such articles, being of the growth manufacture or produce of the said islands, as may now by law be carried from thence to the said States in *British* vessels, and subject only to the same duty and charges on exportation to which *British* vessels and their cargoes are or shall be subject in similar circumstances. Provided always that the said *American* vessels do carry and land their cargoes in the United States only, it being

expressly agreed and declared that during the continuance of this article the United States will prohibit and restrain the carrying of any molasses sugar coffee cocoa or cotton in *American* vessels either from his Majesty's islands or from the United States to any part of the world, except the United States, reasonable sea-stores excepted. Provided also that it shall and may be lawful during the same period for *British* vessels to import from the said islands into the United States, and to export from the United States to the said islands, all articles whatever being of the growth produce or manufacture of the said islands or of the United States respectively, which now may by the laws of the said States be so imported and exported; and that the cargoes of the said *British* vessels shall be subject to no other or higher duties or charges than shall be payable on the same articles if so imported or exported in *American* vessels. It is agreed that this article and every matter and thing therein contained shall continue to be in force during the continuance of the war in which his Majesty is now engaged, and also for two years from and after the day of the signature of the preliminary or other articles of peace by which the same may be terminated."

Article 13th.

"His Majesty consents that the vessels belonging to the citizens of the United States of *America* shall be admitted and hospitably received in all the sea-ports and harbours of the *British* territories in the *East Indies*. And that the citizens of the said United States may freely carry on a trade between the said territories and the said United States in all articles of which the importation or exportation respectively to or from the said territories shall not be entirely prohibited; provided only that it shall not be lawful

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the treaty might be referred to in argument.) The plaintiff at the times when he caused the said goods to be shipped at *London*, and also

lawful for them in any time of war between the *British* Government and any other Power or States whatsoever to export from the said territories, without the special permission of the *British* Government there, any military stores, or naval stores, or rice. The citizens of the United States shall pay for their vessels, when admitted into the said ports, no other or higher tonnage duty than shall be payable on *British* vessels when admitted into the ports of the United States; and they shall pay no other or higher duties or charges on the importation or exportation of the cargoes of the said vessels than shall be payable on the same articles when imported or exported in *British* vessels. But it is expressly agreed that the vessels of the United States shall not carry any of the articles exported by them from the said *British* territories to any port or place except to some port or place in *America*, where the same shall be unladen; and such regulations shall be adopted by both parties as shall from time to time be found necessary to enforce the due and faithful observance of this stipulation. It is also understood that the permission granted by this article is not to extend to allow the vessels of the United States to carry on any part of the coasting trade of the said *British* territories; but vessels going with their original cargoes or part thereof from one port of discharge to another are not to be considered as carrying on the coasting trade. Neither is this article to be construed to allow the citizens of the said States to settle or reside within the said territories, or to go into the interior parts thereof without the permission of the *British* Government established there. And if any transgression should be attempted against the regulations of the *British* Government in this respect, the observance of the same shall and may be enforced against the citizens of *America* in the same manner as against *British* subjects or others transgressing the same rule. And the citizens of the United States, whenever they arrive in any port or harbour in the said territories, or if they should be permitted in manner aforesaid to go to any other place therein, shall always be subject to the laws government and jurisdiction of whatever nature esta-

blished in such harbour port or place, according as the same may be. The citizens of the United States may also touch for refreshment at the island of *St. Helena*, but subject in all respects to such regulations as the *British* Government may from time to time establish there."

"It is agreed that the first ten articles of this treaty shall be permanent; and that the subsequent articles (except the 12th) shall be limited in their duration to twelve years, to be computed from the day on which the ratifications of this treaty shall be exchanged. Lastly, this treaty when the same shall have been ratified by his Majesty and by the President of the United States by and with the advice and consent of their Senate, and the respective ratifications mutually exchanged, shall be binding and obligatory on his Majesty and on the said States, and shall be by them respectively executed and observed with punctuality and the most sincere regard to good faith. And whereas it will be expedient in order the better to facilitate intercourse and obviate difficulties, that other articles be proposed and added to this treaty, which articles from want of time and other circumstances cannot now be perfected, it is agreed that the said parties will from time to time readily treat of and concerning such articles, and will sincerely endeavour so to form them, as that they may conduce to mutual convenience, and tend to promote mutual satisfaction and friendship; and that the said articles after having been duly ratified shall be added to and make a part of this treaty."

An additional article was subjoined to the said treaty before the ratification thereof in *America*, whereby it was further agreed in manner following (viz.) "It is further agreed between the said contracting parties that the operation of so much of the 12th Article of the said treaty as respects the trade which his Majesty thereby consents may be carried on between the said United States and his Islands in the *West Indies*, in the manner and on the terms and conditions therein specified, shall be suspended."

when he caused the policies of assurance to be effected, was a natural-born subject of the King, resident in *London*, and knew that the ship called the *Argonaut* was destined for the *British* territories in the *East Indies*, and that the said goods were intended to be carried on board her directly from the respective places at which the same were so shipped and intended to be shipped as aforesaid to those territories, and intended to be landed and imported there for the purpose of trade therein. The special verdict then stated notice to the defendant of all the premises, and a demand of payment and refusal, and his undertakings in the manner stated in the 1st, 3d, and 5th counts, upon which damages are assessed; and it negatived the promises in the other counts; concluding in the common form.

This case was three times argued at great length; first in *Easter* Term last by *Giles* for the plaintiff, and *Rous* for the defendant; next in *Trinity* Term following by *Gibbs* for the plaintiff, and *Law* for the defendant; and in this Term by *Erskine* for the plaintiff, and *Adam* for the defendant.

On the part of the defendant (a) the following grounds of objection were urged against the plaintiff's right to recover in this action. 1. It is the general policy of this country, manifested by various acts of Parliament from the 9 and 10 *W. 3. c. 44.*, to the 35 *Geo. 3. c. 52.*, and 37 *Geo. 3. c. 31.*, to confine the *East India* trade to be carried on not only from *Great Britain* but by an exclusive company; and it would be very dangerous to break in upon that principle (which includes private rights as well as public policy) further than we are bound to do by the most plain and positive stipulations with foreign countries. The territories, power, and trade of *Great Britain* in *India* are of such extent, that it is of great consequence to any nation to be allowed to participate in the advantages of a commercial intercourse upon any terms. 2. Under the 13th article of the treaty which lets in the *Americans* to the *East India* trade, the circuitous commerce which is the subject of the insurances was not permissible at all, that article only allowing of a *direct intercourse* between the United States and the *British* settlements in *India*: and the word *between* is strongly indicative of that intention in the

(a) It was thought more perspicuous to reverse the usual order of arguments, by stating those of the defendant in the first instance, to which the plaintiff's arguments were an answer.

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framers of the treaty. The term *United States* is there used geographically, as one of the termini; for the privilege to trade *between* them and the *British* territories in *India* is given to "*the citizens* of the said *United States*." The reason why the terms *to* and *from*, made use of in regulating the *West India* trade with *America* in the preceding article, were not adopted in this, was, because in that trade different regulations were required in the different voyages *to* and *from* *America* to the *West Indies*, and therefore it was necessary to discriminate between them: but here there being no such necessity for discrimination, the word *between* is used as comprehending both the other terms, and synonymous with them, and is therefore equally descriptive of the same direct intercourse as it must be acknowledged was intended with respect to the *West India* trade. And so the *Americans* themselves have considered it in the additional article introduced by them, suspending the 12th article, where the term *between* is used as descriptive of the trade *to* and *from*. This construction is further aided by the term *original* cargo in the 13th article, with which only *American* vessels are allowed to trade from one port of discharge in *India* to another; which must mean *original* cargo *from* *America*, and not as in this case from *France*, *Great Britain*, and elsewhere; for it could not have been in the contemplation of the contracting parties that the ships should sail in ballast from *America* in the first instance. And if this be not the true construction, great encouragement will be held out to *British* subjects to carry on this traffic in *American* bottoms, in fraud of the *East India* Company. So the term "*port of discharge*" used in the treaty cannot mean a mere place of *deposit* for the cargo. 3. By the 14th article of the treaty, the trade granted between *America* and the King's dominions in *Europe* is to be subject to the laws of the respective countries; and by the prior existing laws of *Great Britain*, all persons, as well foreigners as natives, (excepting the *East India* Company,) are prohibited trading from *Great Britain* to the *East Indies*. Here the *Argonaut* having originally sailed from *America* to *France*, and from thence to *Madeira*, to take in goods sent from *Great Britain* for that purpose, to be carried to the *British* settlements in *India*, was in effect a trading from *Great Britain* to the *East Indies*; and the *American* owners thereby fraudulently used the privilege granted by the 14th article of trading freely between *America* and *Great Britain* as a colour and pretence for trading from *Great Britain* to the *East Indies*, which is not within the scope of the 13th article,

that

that expressly regulates the trade of *America* with the *East Indies*.

4. Admitting such a circuitous voyage from *America* to *India* by the way of *Europe* to be warranted by the treaty, still this voyage undertaken with that contemplation was illegal in its commencement, that being before the ratification of the treaty. And no part of an illegal voyage can be insured. The 23d stat. of the 37 *Geo.* 3. c. 97. only ratifies acts and engagements done and entered into by the respective people after such ratification. But if it be considered only as a voyage from *Bourdeaux*, and so commencing after the ratification of the treaty, then it is not within the protection of the 13th article, as not being a trading between *America* and the *East Indies*, even in the most extensive sense of it.

5. Whatever privileges *Collet*, for whose benefit the insurance was made, might have claimed as an *American* citizen, yet having been born under the King's allegiance, and not being a citizen of the United States at the time of the declaration of their independence, he can only be considered as a *British* subject within the scope of the navigation laws of *Great Britain*. *Vattel*. b. 1. c. 19. §. 20 to 22. considers that it belongs to the particular laws of each country to declare who are its citizens. But it is clear that by the laws of this country no subject can shake off his allegiance. *Co. Lit.* 129. a. *nemo patriam in qua natus est exuere, nec ligeantiae debitum ejurare, possit.* *Fost. C. L.* 184. In case of high treason no subject can allege in his defence that he was in the service of a foreign state. *Townly's Case*, *Fost.* 7. *Macdonald's Case*, *ib.* 59, 60; in which latter case it is said that it is not in the power of a foreign prince, by naturalizing or employing a subject of *Great Britain*, to dissolve the bond of allegiance between that subject and the Crown; though by such foreign naturalization he may entangle himself (says Lord *Hale*, Vol. I. 68.) in difficulties and in a conflict of duties. But in these cases, *Huberus*, b. 1. tit. 3. c. 2 and 12. lays down the principle that curtesy is only due to the laws of another country so far as they do not clash with our own. Now here, *Collet* having inconsistent duties to perform, as an *American*, and as a *British* subject, cannot be received in both characters. As a *British* subject he is under an absolute incapacity by virtue of the act of navigation 12 *Car.* 2. c. 18. of being received in the character of master of an *American* vessel; and in the same character he is expressly prohibited by the acts for regulating the trade to the *East Indies* from trading thither, except under the orders or by the license of the *East India* Company. If *Collet*, being a natural-

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born subject, could navigate a *British* ship, it seems to follow that he could not navigate a foreign vessel as a citizen of that country to which the vessel belongs. If he could, it would operate as an encouragement to all our seamen to emigrate and settle in foreign countries. *Collet* was in that situation, that when at home he might have been restrained from going out of the kingdom by the writ *ne exeat regno*, and when abroad he might be recalled by the King's proclamation. *Dy. 296. a*; and in fact he was comprehended in the proclamation stated in the special verdict. No alteration in the rights and duties of a natural-born subject can be effected but by act of Parliament, not even by the sole act of the King, much less by any act of his own. Instances of such alteration by the Legislature occur in the 14 and 15 *Hen. 8. c. 4.* as to alien duties; in 5 *Geo. 1. c. 27.* as to artificers going abroad; in the 26 *Geo. 3. c. 60. s. 8.* as to ship-owners residing out of the King's dominions; in the 34 *Geo. 3. c. 68. s. 8.* as to masters and mariners taking oaths of allegiance to any foreign state. As to the case of *Scott q. t. v. Schwartz, Com. Rep. 677.*, where it was holden that foreigners domiciled in *Russia* might be considered as *Russian* seamen within the act of navigation, it is to be observed that the opinion of the Court turned altogether upon the cases of foreigners of a third country so domiciled; to which no objection could be made on our part, if such were the law of *Russia*, as it appeared to be. But with respect to one of the mariners there, who was an *Irishman*, no opinion was given; and his was treated as a distinct case from the others. It is therefore no authority in the present case. But by a late decree of the Privy Council (a) on 23d *June 1797*, it was declared that one *Smith*, who had become a citizen of the United States since the declaration of independence, was not a legal captain of an *American* vessel within the navigation act; and on that account they decreed that she was liable to confiscation in the port of *Liverpool*, where she had entered and had been seized: but, in consideration that it was the first case of the kind which had occurred since the independence of *America*, the forfeiture was remitted by the Crown. A similar case was there mentioned, which is to be found in *Reeves's Law of Shipping, 252.*, where a *Scotchman* claiming to be a burgher of *Stockholm* came to this country with a *Swedish* vessel of which he was mas-

(a) This was stated to have been in conformity with the opinion of the King's Advocate, and the Attorney and Solicitor Ge-

neral, which were taken on the part of the Crown.

ter; but the Privy Council in 1732, by the advice of Sir *Philip Yorke* then attorney-general, rejected his claim, in consequence of which a forfeiture of the vessel was incurred. All the authorities seem reconcileable on this principle, that admitting that a subject of this country may gain a right of citizenship by adoption in a foreign country, which may be recognized here, still that can only hold good while he continues absent from his own country; but immediately upon his return all his natural rights and duties revive, and he can no longer exercise any privilege inconsistent with the character of a natural-born subject. He cannot excuse himself from any obligation which the law throws on him as such; still less can he do an act which is positively forbidden to be done by any resident subject of *Great Britain*.

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Arguments for the plaintiff.—1. Before the treaty *America* had a right to purchase goods in any port of the world, and carry them to any port in the *East Indies*, except within the limits of the *British* settlements. The only boon therefore that *Great Britain* could confer in this respect was the right of trading to her own ports there. This was meant to be given by the treaty in question, confirmed by the two acts of the 37 *Geo. 3. c. 97*, and 117. The only restraint the policy of this country required was that *America* should not import *East India* goods into *Europe* from our settlements; but the importing of *British* goods instead of her own into *India* was a benefit rather than a disadvantage to *Great Britain*, and therefore could never have been intended to be prohibited. 2. The right of trading to every part of the *British* dominions was given to *America* in the most general terms by the 11th article of the treaty, which establishes a reciprocal and entirely perfect liberty of navigation and commerce between the two nations. But this is on certain conditions after specified; which was meant to preclude any restriction by implication. Then this is followed up by the 13th article, which respects the *East India* trade; whereby the King consents in the first instance that the *Americans* shall be admitted and hospitably received in all our ports and harbours there; and then he gives liberty to the *Americans* freely to carry on trade between the said territories and the United States in all articles, except such the importation or exportation of which is prohibited. The prohibition therefore is as to the articles, and not as to the place from whence they come. The effect of this, if it stood alone, would be that the *Americans* might trade freely to or from the *East Indies* by whatever circuitous rout they pleased; for

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trade is a word of the largest signification. And it is to be observed that no such liberty to trade freely is given by the 12th article, as to the *West Indies*, but only a liberty *to carry*, &c. And this construction must have been the understanding of the contracting parties, as appears by the stipulation which immediately follows, namely, that the *Americans* shall not carry any articles exported from the *British* territories in *India* except to some port or place in *America*. This proviso would have been unnecessary if the word *between* were understood as limiting the trade before to a direct intercourse. But the express stipulation in restraint of the homeward trade to *America*, and of that only, shews that no such restriction was intended as to the outward trade, which therefore remains to be enjoyed according to the phrase of the treaty with *an entirely perfect liberty*. Neither does the word *between*, independently of explanatory matter, necessarily mean a direct intercourse *to* and *from*: but admitting that it would in general, yet here it is confined expressly to the homeward trade, that is, *from* the *British* territories in *India* *to* the United States. And if this had been intended to apply to both the voyages, why should the expressions used in the 12th article as to the *West India* trade, which expressed that sense in the most unequivocal manner, have been varied from in the 13th? The term "*original cargo*," as applied to the coasting trade in *India*, means no more than the *outward-bound* cargo as contradistinguished from a cargo collected in *India*, and can by no usage or construction be limited to a cargo collected in *America*, which might have been more easily expressed in terms if so intended. And it would have been absurd if it had been so limited: for it cannot be denied that, if *European* goods were imported into *America*, they might not afterwards be shipped from thence to the *East Indies*; and the framers of the treaty could never have intended so frivolous a distinction, as that it might be permitted to do that indirectly which could not be done directly. It would also be injurious to sound policy, as the only effect of it would be that of making *America* a depôt of goods for the *East Indies*.

3. There is no ground for the supposed dilemma of the commencement of the voyage being either illegal, as made with the contemplation of going to our settlements in the *East Indies* before the ratification of the treaty, or not being within the protection of the treaty at all, as commencing in *France* and not in *America* after such ratification. For in fact it did commence in *America* as

it legally might without any treaty, if not intended to go to the *British* ports there: and the special verdict only finds that *Collet* had a voyage to the *East Indies* in contemplation when he sailed from *America*: it does not appear that he had any intention of proceeding to the *British settlements in India* until after the ratification of the treaty. At any rate no illegal act had been done before the policy commenced, at which time the ratification had taken place. In the case of *Camden v. Anderson* (a) tried before Lord *Kenyon* at *Guildhall*, which was an action on a policy of insurance from *Bombay* home, though the ship had before gone beyond the extent of the license granted by the *East India Company* in sailing to *Goa* and getting a cargo there for *Bombay*, yet it was holden that the underwriter could not take advantage of an act of forfeiture committed by the ship on a prior voyage before the one insured. 4. It is now clearly settled that though a natural-born subject cannot throw off his allegiance to the King, but is always answerable criminally for acts done by him against it, yet for commercial purposes he may acquire the rights of a citizen of another country; to ascertain which recourse must be had to the laws and usages of that country which has adopted him. This rule was established in the case of *Scott q. t. v. Schwartz, Com. Rep.* 677. 689. and has been always adhered to since. In like manner denizens of this country are entitled to all commercial advantages of natural-born subjects, (but not to many political ones,) though their allegiance is still due to their natural Sovereign. The case alluded to of *Smith*, and others of the like sort, turned altogether upon the question of fraud. *Smith* had become a citizen of *America* for a particular purpose, and not *bonâ fide*: there was no previous residence or domicile there, as there was in this case. *Collet* naturalized and domiciled in *America* could not have insured his property *English*, supposing a war between *France* and *America*, and *England* in a state of neutrality: nor could he have availed himself of the privilege of trading as an *Englishman* without returning to this country to reside or fixing his domicile here. It was so considered in the report of the case in *Com.* 690. Then if he were an *American* citizen within the navigation act while his domicile remains in *America*, his merely coming here for a tem-

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(a) This was not the case reported *ante*, | same transaction, and about the same time.
6 vol. 723, but stated to arise out of the |

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porary purpose will not change the nature of his situation, or deprive him of his rights as a citizen of the United States.

Cur. adv. vult.

Lord KENYON Ch. J. now delivered the opinion of the Court. As this case was argued so recently, and as every argument was urged that bore on the subject either on the one side or the other, little remains for us but to draw the proper conclusion from those arguments.

Without stating again all the facts of the case, the question is, whether, as the ship and goods insured have been totally lost to the assured, the party against whom this action is brought be or be not liable to pay that loss on his contract of indemnity? In discussing that question other points of great magnitude were raised. On the part of the defendant it was said that this was a case of vast importance, because it was an attempt by the plaintiff to invade the monopoly of the *East India* Company, and to supplant them in their trade, and that this affected the Public as well as individuals, because the *East India* Company is so nearly connected with the political state of the country, and because our possessions in the *East Indies* contribute so largely to the revenues of this country. On the other hand it is a case of great importance, inasmuch as it involves in it the fair exposition of the treaty between this country and *America*. And in the course of the argument we were (a little irregularly) threatened on both sides, by the one party not to touch the concerns of the *East India* Company, by the other not to irritate our allies in *America*. With regard to the *East India* Company; they will always find their interests secured by the laws of this country as administered in our courts of justice. And I hope that there is no jealousy, or even ground of jealousy, on the part of the *Americans*, but that they know that when their rights come to be discussed here the greatest attention will be paid to their interests. They have long been acquainted with the habits of this country, and with the mode of administering justice here: until within these few years their causes used to come over here to be discussed, and I never heard that the decisions in our courts ever awakened the least jealousy in the breasts of the inhabitants of that country.

The great question in the cause is whether or not, the loss having happened, any circumstances be disclosed in the verdict on which the defendant can resist the plaintiff's claim. Three objections

have been raised on the part of the defendant. I will dispose of that first, which was the last in the argument, namely, that *Collet* the captain of the ship and part-owner was an *Englishman* by birth, and was not therefore a citizen of *America* within the meaning of the treaty between this country and *America*. On a former day we intimated our opinion that there was not much weight in this objection, and after consideration we are clearly of opinion that there is none. *Collet* is a citizen of this country by birth, so that he cannot throw off his allegiance to this country: he is also a citizen of *America* for the purposes of commerce, it being found by the special verdict that he has been adopted as a citizen of that country. And the circumstance of his being a natural-born subject here cannot deprive him of the advantages of being a citizen of that country.

The next objection arises on the construction of the 13th article of the treaty between this country and *America*, which has been confirmed by act of Parliament. It was contended that the intercourse must be *immediate and direct* between *America* and the *East Indies*, on the true meaning of that article: but on the fullest consideration that we can give, comparing this with the other articles of the treaty, we are also of opinion that this objection is unfounded. That the party insured might have come from *America* to other countries in *Europe* and bought goods and carried them back to *America*, and from thence to the *East Indies*, seemed to be admitted. Then, in point of reason, why may not that which may be done indirectly be done directly? and on the fair construction of the words of this article we think that this objection cannot prevail.

The remaining objection is that the voyage insured was a part of a voyage, the whole of which (supposing it to be one integral voyage) was not legal in its inception, and that if there be any infirmity in any part of an integral voyage, the whole for this purpose becomes illegal. But this argument is too refined as applied to this case. Before the commencement of this voyage there was a rumour that a treaty between the two countries was in agitation, and this person came to *England* probably with a view of carrying on the voyage to the *East Indies* under the treaty. However, in deciding this case we must look to the facts disclosed in the special verdict. Now it is not there stated that the continuation of the voyage to the *British settlements in the East Indies* was the

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voyage that was at all hazards to be performed when the voyage began in *America*. For though different plans had been suggested by *Butler* in his letter for the continuation of the voyage, it is only found by the special verdict that *Collet*, when he sailed from *America*, intended to go to the *East Indies*, without saying to that part that belongs to *Great Britain*. As far as respected the *Americans*, every other part was *mare liberum*; and though before the treaty the party assured could not have gone to any of our ports in the *East Indies* without being guilty of an infraction of our laws, he might have gone to any other port in the *East Indies*. Every thing therefore in the verdict relating to these different plans, though a fair subject of investigation and discussion, may now be laid out of our consideration; it not being found in any part of the special verdict what precise voyage the parties had in contemplation at the inception of the voyage in *America*. Then, if the voyage insured be not infected by what was done in *America*, it was a legal voyage. The ship originally sailed from *Philadelphia* to *Brest* and then to *Bordeaux*, which she might legally do; and before she left the latter place the treaty between this country and *America* was ratified; it then appears that in *May* 1796 she sailed to *Madeira*, where she took in other goods, "for the purpose of proceeding with the whole cargo to the *British* territories in the *East Indies*," which then she might well do under the treaty that had before that time been ratified. Then it does not appear that *Collet* had any intention of going to any of our settlements in the *East Indies* until after the ratification of the treaty. And though I admit that, if there had been any infirmity in any part of the integral voyage, it would have made the whole illegal, so that the assured could not recover upon a policy on any part of it, yet it not appearing that in fact there was any illegality in any part of this voyage, we are of opinion that this objection also fails.

On the whole therefore we are of opinion that the plaintiff is entitled to the judgment of the Court.

Judgment for the plaintiff.

[This case was carried by writ of error before the Exchequer Chamber: & there the judgment was affirmed, & in 1. Brown & Fuller 430. Lord Ch. J. Lyne's argument on delivering the judgment of affirmance is given at length. T.H.]

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Thursday.
Nov. 22d.SALT *against* SALT and Another, Executors.

THE plaintiff having brought an action against the defendants, as executors of the last incumbent of the rectory of *Hildersham* in *Cambridgeshire*, for dilapidations, the defendants paid 300*l.* into court under the common rule; to set aside which rule the plaintiff obtained another rule nisi, on the authority of *Squire v. Archer*, 2 *Str.* 906.

The defendant cannot pay money into court, on the common rule, in an action for dilapidations.

Wood shewed cause against that rule (a). It is a general rule that in all actions for non-payment of money the defendant may bring money into court, though in actions of trespass or tort he cannot. Now this is in substance an action for non-payment of money. The declaration states, in the usual form, that by law all rectors &c are bound to repair; that if they leave the houses &c out of repair they or their executors are bound to satisfy to the successors so much money as will be sufficient for the purpose of repair; that the house in question was left by the defendants' testator out of repair; and that a large sum of money, to wit, 950*l.*, is necessary to be laid out in the repair; and the breach is, the non-payment of that sum. The circumstance of the sum demanded being uncertain is no objection to paying money into court, because that objection would equally apply to a quantum meruit, and yet in such a case there is no doubt but that money may be brought into court. In the Ecclesiastical Courts, where suits of this kind are more frequently instituted than in the common law courts, the defendant is permitted to pay money into court; therefore for the sake of uniformity the proceedings ought to be the same in both courts. With regard to the case cited from *Strange*; it is observable that it is a short loose note, not expressing the grounds on which the Court proceeded: but the authority of that case may well be doubted, when it is considered that in *Oke v. Ange* (b) it was taken for granted that a defendant might plead a tender (which is like paying money into court) to such an action as the present. Besides this is an action against executors, who are more favoured by the law than other persons. They have not been guilty of any default; and it seems more just that such defendants should be permitted to pay money into court, in order that if that sum be sufficient the plaintiff should proceed in the

(a) Yesterday.

(b) 3 *Lev.* 413.

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action at the peril of costs, than that the plaintiff should compel them to proceed to trial at the hazard of costs, which, in case they have no assets, must be paid de bonis propriis.

Wilson in support of the rule. The rule by which the Courts have been guided in cases of this kind is that mentioned by Lord *Mansfield* in 2 *Burr.* 1120, that "where a sum demanded is a sum certain, or capable of being ascertained, without leaving any sort of discretion to be exercised by the jury," the defendant may pay the money into court. But this demand, so far from being certain or capable of being ascertained by mere computation, is perhaps of all others the most uncertain that can be brought into a court of justice, it depending on the opinions of architects and surveyors. In an action of covenant for not repairing, it is clear that the defendant cannot pay money into court; and the present is like such an action. It is indeed more like an action on the case in nature of waste, where the defendant can neither plead a tender or pay money into court. The plea in both is not-guilty. The circumstance of this being an action against executors affords no reason for allowing them this privilege. In many instances the action is brought against the predecessor himself; and though this is an action against executors, it must be remembered that they represent the predecessor for whose delinquency they are answerable. Independently however of any reasoning, the case in *Strange* is a direct authority to shew that money cannot be paid into court in an action of this kind. Nor is the authority of that case diminished by the case in *Levintz*, in which this question neither did or could come in judgment before the Court. There the plaintiff took issue on the plea of tender which was found against him; and the Court had no opportunity of deciding on the legality of the plea.

The Court said that in point of reason the defendants ought to be permitted to pay money into court, but wished to have an opportunity of looking into the cases before they decided the question. But on this day

Lord KENYON Ch. J. said, we have looked into the cases, and are of opinion that they do not warrant us in determining that money may be paid into court in this action. The case of *Squire v. Archer* is a direct decision on the point; and the same case is also reported in 2 *Barnard.* 4., which, though not a book of much authority in general, agrees with the report of the case in *Strange*. Therefore the present rule must be made absolute.

GROSE J. added that the true grounds, on which rules for payment of money into court are granted, are accurately stated in *Tidd's Practice* (a).

Rule absolute (b).

(a) Vid. *Tidd* 408. *et seq.*

(b) Vid. *Griffiths v. Williams*, ante, 1 vol. 710; *Bowles v. Fuller*, ante, 7 vol. 335; *Vernon v. Wynne*, 1 H. Bl. Rep. C. B. 24; and *Hutton v. Bolton*, E. 22 Geo. 3. B. R. 1 H. Bl. 299. note, b.

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LORD KINNAIRD and others *against* BARROW.

Thursday,
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THE defendant, having been a prisoner in the *Fleet* prison on the 12th of *February* 1794, was discharged at the *London* Quarter-Sessions on the 15th of *July* in that year under the insolvent debtors' act 34 Geo. 3. c. 69. After which he was arrested at the suit of the plaintiffs for a debt of 80*l.*; 30*l.* part of which was due to them before the 12th of *February*; the remaining 50*l.* became due in this way; the defendant had given a bill of exchange for 20*l.* and a promisory note for 30*l.* before the 12th of *February* 1794, both payable six months after date to *J. Parkyns* or order; the former was dated on the 10th, the latter on the 13th of *October* 1793, and they respectively became due on the 13th and 16th of *February* 1794.

By the insolvent debtors' act 34 G. 3. c. 69. an insolvent person is discharged as to debts growing due, as well as those due before the 12th of *February* 1798; which words apply to a debt on a promisory note or bill of exchange given before, but not payable until after, that day.

Balmanno on behalf of the defendant obtained a rule on a former day, calling on the plaintiffs to shew cause why the defendant should not be discharged out of custody, because the whole of the plaintiffs' debt was either *due* or *growing due* before the 12th of *February*, the day mentioned in the insolvent debtors' act (a), on the authority of *Workman v. Leake* (b) and *Paget v. Wheate* (c); in the former of which cases it was holden that a debt arising on a promisory note indorsed by the defendant to the plaintiff before, but not payable until after, the day mentioned in the insolvent debtors' act, 12 Geo. 3. c. 23. (penned like the present act,) was a debt "growing due" within the meaning of that act; and in the latter a similar determination was made on the construction of the insolvent debtors' act 18 Geo. 3. c. 52. in the instance of a bond executed before but not payable until after the day mentioned in that act.

(a) By 34 Geo. 3. c. 69. s. 31. It is enacted that no person, entitled to the benefit of that act, shall at any time thereafter be imprisoned for any debt, bond &c. sum or sums of money contracted, incurred, oc-

casioned, owing or growing due, before the 12th of *February* 1794, &c.

(b) *Cowp.* 22.

(c) *Dougl.* 668. See also *Cotterel v. Hooke*, *ib.* 97.

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Garrow, who now shewed cause, contended that neither of the sums of 20*l.* or 30*l.* was due on the 12th of *February* 1794; and that the plaintiffs could not have sworn to either of them as a debt due at that time. But

The Court were clearly of opinion that these two sums were within the letter as well as the spirit of the act of Parliament. That the words "growing due" meant something more than "owing" or "due;" and that those words were inserted for the purpose of meeting such a case as the present. That this and the other insolvent acts alluded to, being made in *pari materiâ*, ought to receive a similar construction; and that the case in *Cowper* was a direct authority in point. Therefore they made the

Rule absolute (a).

(a) See also *Marks v. Upton*, ante, 7 vol. 305. on this very act.

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Where one as a trustee conveys land to another to which there is no access but over the trustee's land, a right of way passes of necessity as incidental to the grant. If the owner of two closes, having no way to one of them but over the other, part with the latter without reserving the way, it will be reserved for him by operation of law. *Semb.*

TO trespass for breaking and entering the plaintiff's close called the allotment at *Ockbrook* in the county of *Derby*, on the 1st of *January* 1796, the defendant pleaded, 1st the general issue, on which issue was joined; secondly, that the close called the *Allotment* was contiguous and next adjoining on the west side to a close of the defendant's called the *Upper Meadow*, on the east to a close of the plaintiff's called *Draycot Field* which adjoins on the east side to a highway leading from *Draycot* to *Ockbrook*. That before the said time when &c, on the 1st of *April* 1793, the plaintiff, *R. Dowman*, *F. Jessopp*, and *J. Collier*, were seised in fee of the said three closes called the *Allotment*, the *Upper Meadow*, and *Draycot Field*, and being so seised they sold and conveyed to the plaintiff the two closes, the *Allotment* and *Draycot Field*. That afterwards, and whilst the plaintiff, *R. Dowman*, *F. Jessopp*, and *J. Collier*, continued seised of the *Upper Meadow*, and before the said time when &c, to wit, on the 4th and 5th of *July* 1793 by lease and release they conveyed the *Upper Meadow* to the defendant in fee. That the plaintiff, *R. Dowman*, *F. Jessopp*, and *J. Collier*, and their tenants during all the time they were seised of the *Upper Meadow* "had a necessary way for themselves their farmers and tenants, occupiers of the *Upper Meadow*, from and out of the *Upper Meadow* into through and over the *Allotment*, and from

and

and out of the *Allotment* into through and over *Draycot Field* to the highway leading from *Draycot* to *Ockbrook*, and so back again to go and return pass and repass with their cattle every year at all times of the year for the convenient and necessary occupation of the *Upper Meadow*, and had no other way for themselves and their farmers and tenants occupiers of the *Upper Meadow* to go and return with their cattle from the *Upper Meadow* to the said highway and back again for the convenient and necessary occupation of the *Upper Meadow* but into and over the *Allotment* and from thence into and over *Draycot Field* and so back again." That ever since he (the defendant) became seised of the *Upper Meadow* as aforesaid he had had and still of right ought to have the said necessary way for himself and his farmers and tenants occupiers of the *Upper Meadow* (stating it as before); and then he justified going with his cattle into through and along the said way in the said close in which &c for the convenient and necessary occupation of his close called the *Upper Meadow* &c.

The plaintiff replied that the defendant of his own wrong committed the trespass, traversing that the plaintiff, *R. Dorman*, *F. Jessopp*, and *J. Collier*, and their tenants during the time they were seised of the *Upper Meadow* had a necessary way over the *Allotment*, and so through *Draycot Field* into the said highway, and that the defendant since he became seised of the *Upper Meadow* had the said necessary way &c, in the language of the plea; on which issue was taken.

On the trial at *Derby* a verdict was found for the plaintiff, subject to the opinion of this Court on the following case.

Previous to the inclosure of the open fields and meadows in the liberty of *Ockbrook* in the county of *Derby* in the years 1772 and 1773 the lands within the liberty consisted of old inclosures, three open arable fields, called *Upper Field*, *Draycot Field*, and *Burrow-wash Field*, a meadow called *Ockbrook*, divided into several parts, one of which was called *Upper Meadow*, and certain common grounds lying in the said open fields. The *Upper Meadow* was bounded on the north by old inclosures then and now called *Reedy Pieces*, and part of the then said open fields called *Upper Field*; on the east by an old inclosure called the *Carr*, another then open field called *Draycot Field*, (being the plaintiff's land called by that name in the pleadings,) and other old inclosures; on the south by old inclosures; and on the west by the said then open field called *Burrow-wash Field*. The *Upper Meadow* belonged

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to several proprietors who had distinct interests therein until the crop was got, and afterwards they depastured the land in common. The road to the *Upper Meadow* was at that time out of a highway called *Collion Lane* (a) over the east side of that part of the then open field called *Burrowash Field* marked No. 75. in the plan (b) annexed into and over the east side of an old inclosure marked in the plan No. 76., called *Hillsway Close*, into the corner of another part of the said *Burrowash Field* marked in the plan No. 77., and from thence into the said *Upper Meadow*. In the year 1772 an act of Parliament passed for dividing and inclosing several open fields &c in *Ockbrook*, by which the commissioners named therein were directed and empowered to set out public and private carriage bridle and foot ways over the lands and grounds thereby directed to be divided and inclosed to any allotments to be made by virtue thereof or to any old inclosures &c. for such uses and purposes as the said commissioners should in their award order and direct. And by that act it was also enacted that it should not be lawful for any person or persons after the execution of the award to use or claim the use of any roads or any ways either old or new public or private over within or through the lands and grounds thereby intended to be divided &c either on foot or with horses &c, other than such roads or ways as should be so set out and appointed by the commissioners, and that all former roads or ways or so much thereof as should not be so set out and appointed as roads should be deemed part of the lands to be divided and inclosed. At the time of the inclosure *S. Dalby* widow was seised for her life of an estate in the liberty of *Ockbrook* consisting of old inclosures and lands in the open fields and meadows, which estate was limited in remainder after her decease to her son *J. J. Dalby* in tail; and *J. J. Dalby* was also entitled in possession to an estate in *Ockbrook*, which upon his marriage were settled upon himself and wife for their lives, with remainder to their first and other sons in tail. The commissioners by their award dated the 22d of *January* 1773 allotted and awarded unto *S. Dalby* (in lieu of her lands in the open fields) in severalty the *Upper Meadow* and that part of *Draycot Field* which adjoins to it and now belongs to the plaintiff. The lands so allotted to her lie con-

(a) *Collion Lane* ran from west to east by the north side of *Reedy Pieces*.

(b) No. 75, and 76. adjoined the *Reedy Pieces* on the west, and No. 77. was to the

west of *Upper Meadow*; and the road described in the plan came into the north-west corner of *Upper Meadow*.

tiguous to each other, and the east side of the said allotment in *Draycot Field*, as well as an ancient inclosure (called the *Carr Close*) belonging to *S. Dalby* and adjoining to the *Upper Meadow*, is bounded by a public highway leading from *Draycot* to *Ockbrook*. The commissioners did not set out or appoint any road whatsoever to the *Upper Meadow* or the other lands allotted to *S. Dalby*. The road, used previous to the inclosure and when the open fields were in tillage out of *Collion Lane* to the *Upper Meadow* as before stated, was not set out or awarded by the commissioners, but they set out and awarded a road to the occupiers of the *Reedy Pieces* in these words, "One other private carriage and drift road from *Collion Lane* into and over the east side of the lands allotted to *Dame Mary Lake* No. 75. to an old inclosure allotted to *J. J. Dalby* No. 76, for the use of the owners and occupiers of several old inclosures called the *Reedy Pieces*, for ever."—As soon as the allotments were set out *J. J. Dalby* began to occupy (as tenant to his mother) that part of the allotment in the *Upper Meadow* which now belongs to the defendant. About the same time he agreed with the proprietors of the old inclosure No. 76. for the exchange of other lands (to which he was entitled in possession as aforesaid) for the old inclosure, and the exchange was carried into effect by the award of the commissioners under a power in the inclosure act. *Mrs. Dalby* died in *April* 1786; and upon her death *J. J. Dalby* became entitled in possession as tenant in tail to the lands which had been allotted to her, and in *Trinity* term in that year suffered a recovery of the same, and limited it to himself in fee. *J. J. Dalby* died in *October* 1792; and from the date of the award to the time of his death that part of the *Upper Meadow* which now belongs to the defendant, and the said ancient inclosure No. 76., were occupied by the same tenant by himself for six years and by *S. Phipps* for the remainder of the time without any connection in respect of roads with the other lands allotted to *Mrs. Dalby* and now belonging to the plaintiff. And although the use of the road set out by the commissioners and awarded over the new inclosed lands No. 75. was limited by the award to the *Reedy Pieces*, *J. J. Dalby* and his tenants of the old inclosure No. 76. and the defendant's *Upper Meadow* made use of the said road for all purposes whatsoever as a road to the said inclosure No. 76. and the defendant's *Upper Meadow* during the whole of the abovementioned period. Upon the death of *J. J. Dalby* his eldest son became entitled under his father's marriage

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settlement to the old inclosure No. 76. and at *Lady-day* 1793 sold and conveyed it to *J. Elliot* the present owner thereof. *J. J. Dalby* by his will dated 26th *January* 1791 devised all the lands so allotted to his mother to trustees (of whom the plaintiff is one) for the sale thereof; and in *April* in that year the plaintiff purchased and became possessed of the said close called the *Allotment*, and the close called *Draycot Field*, and also the close called *Carr Close*. In *July* following the defendant purchased of the said trustees the close called the *Upper Meadow* with all ways &c. belonging thereto. Very soon after the defendant had made this purchase, *J. Elliot* and the owners of the new inclosure No. 75. stopped up the road over their respective lands to the *Upper Meadow*. The question is whether the plaintiff is entitled to recover.

This case was argued at length in *Trinity* term last by *Burton Morice* for the plaintiff and *Clarke* for the defendant.

The former then contended that, when a man grants land without reserving to himself a right of way over it, the law will not reserve such right for him, however necessary or convenient; and the defendant claiming under a person so circumstanced cannot be in a better situation. *Dell v. Babthorpe*, *Cro. Eliz.* 300. (*Lawrence J.* observed that it did not there appear to be necessary to go over the close in question to the wood; there might be another way to it.) Such a right can only be claimed in two cases, either where the law itself confers a right to something upon another man's land, in which case it also gives every power necessary to the enjoyment of it, and by consequence a right of ingress and regress, or where one grants land to another, to which there is no access except over the soil of the grantor, and there the right of way is incidental to the grant, on the principle that the grant shall be taken most strongly against the grantor, and because such right is necessary to the enjoyment of the thing granted, and without which it would be of no avail. That was the principal point resolved in *Clark v. Cogge*, *Cro. Jac.* 170. It was there indeed also added, that if a man having four closes lying together sell three, reserving the middle one, and have not any way to it but over one of those which he sold, though he did not reserve the way, yet he shall have it as reserved to him by law. But that was merely an obiter dictum and not supported by the books referred to in the margin, which relate only to authorities given by law. As where the law gives a right to a tenant at will to go upon the land to take the emblements; yet that is only where the Lord

puts an end to the tenancy; for if it be determined by the tenant's own act, the Lord shall have the emblements. *Oland's case*, 5 Co. 116. 1 Rol. Abr. 726. So here, it being the grantor's own act to grant away his land without reserving a right of way, the law will not supply his omission to the prejudice of the grantee's right. *Keymer v. Summers*, Hereford Sum. Ass. 1769, cor. *Yates J. Bull. Ni. Pri.* 74. Besides, the facts stated in this case negative that this was a *necessary* way; for it appears that before the inclosure act another way was used. (*Lawrence J.* But it also appears that that way was put an end to by the commissioners, and cannot now be set up again.)

Clarke for the defendant. As by the inclosure act the commissioners were to set out all necessary public and private ways, and all other ways not by them set out were to cease and determine, it is clear that the defendant can no longer make use of the old road by the *Reedy Pieces*; so that if he cannot enjoy the road in question, he has no means of getting at his land at all. His right therefore arises of necessity, and upon a principle of public policy, which will not endure that any person shall be under the necessity of leaving his land uncultivated, because he cannot get at it without being a trespasser; for this would operate as a public detriment no less than a private loss. The case before *Yates J.*, which was of a prescriptive right of way claimed, and others of the same sort, do not apply, for in them the road claimed did not appear to be a road of *necessity*, but merely of *convenience*, which might be lost without detriment to any but the owner. The case of emblements proceeds on another ground, that where the party was not entitled to the emblements themselves he consequently could have no right to go on the owner's land to take them away: but where he has a right to the emblements he has a right of way necessarily incident. The claim of a way of necessity as given by law is expressly recognised in the case cited of *Clark v. Cogge*, Cro. Jac. 170. in *Staple v. Heydon*, 6 Mod. 3, 4. and 1 Rol. Abr. 936. pl. 10.; and it was expressly determined to be good in *Dutton v. Tayler*, 2 Lutw. 1487. because, as it is there said, it is for the public good that the land should not be unoccupied. Besides, in this case the defendant claims under a grant from several persons, one of whom was the plaintiff himself; and therefore on the ground admitted in argument the plaintiff must be taken to have granted this necessary way.

In reply, it was observed that the case of *Dutton v. Taylor* was contrary to all former received opinions; and that upon the principle

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ciple there laid down a right of way would be reserved in law even against the express release of the party. But at any rate this could not authorize a new way over the soil of another, where none of right existed before. And as to the last ground; that the plaintiff had joined in the grant to the defendant merely as a trustee and not in his own right, and therefore ought not to be concluded by such an act to his own prejudice.

Lord KENYON C. J., entertaining great doubt upon the general question, desired that the case might be argued again. But on this day, when

Perceval was to have argued for the plaintiff and *Balguy* for the defendant,

Lord KENYON C. J. said, upon further consideration I find it impossible to distinguish this from the general case, where a man grants a close surrounded by his own land, (in which case the grantee has a way to it of necessity over the land of the grantor,) merely on the ground that the plaintiff conveyed to the defendant in the character of a trustee; for it cannot be intended that he meant to make a void grant. There being no other way to the defendant's close but over the land of one of the persons who granted to him, he was entitled to such a way of necessity upon the authority of all the cases, upon the principle that every deed must be taken most strongly against the grantor. It was competent to those who conveyed to the defendant, when they granted the *Upper Meadow*, to grant him a way to it over their own land. When they made the conveyance, it must be taken for granted that they intended to confer some beneficial interest, but he can derive no benefit whatever from the grant unless he has a right of way to the land. Even upon the general ground I was prepared to submit to the express authority of the case in *Lutwich*, though I cannot say that my reason has been convinced by it. There are I think great difficulties in the question; but in the other mode of considering the case, those difficulties are gotten rid of altogether, and it falls within all the authorities which are not controverted even by the plaintiff.

Per Curiam.

Postea to the defendant (a).

(a) Vid. *Parker v. Welsted*, 2 Sid. 39. | *Latch* 153. *Noy* 84. 3 *Bulstr.* 339. S. C.
111. *Sury v. Pigot*, *Poph.* 166. *Palm.* 444.

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Friday,
Nov. 23d.DOE on the demise of MITCHINSON *against* CARTER.

ON the trial of this ejectment at the last assizes for *Essex* before Mr. Justice *Buller* a verdict was found for the lessor of the plaintiff, subject to the opinion of this court on the following case.

The lessor of the plaintiff, being seized in fee of the premises in question, demised the same by lease dated the 28th of *September* 1784 to *J. Braban*, in which lease there is the following covenant and proviso; that *Braban*, his executors, administrators, or assigns should not let, set, assign, transfer, make over, barter, exchange, or otherwise part with this indenture or the said messuage, lands, &c. hereby demised, or any part thereof, to any person or persons whomsoever, for all or any part of the said term, without the special license, consent, and approbation of *Mitchinson*, his heirs or assigns, in writing; provided always that if *Braban*, his executors, administrators, or assigns, or any of them, should let, set, assign, transfer, or make over this indenture or the said premises hereby demised, or any part thereof, to any person or persons whomsoever, without the license or consent of *Mitchinson*, his heirs or assigns, in writing, or if all or any of the covenants, &c. on the part of *Braban*, his executors, &c. should not be by him or them paid, observed, &c. according to the true intent, &c., in either of those cases it should be lawful for *Mitchinson*, his heirs and assigns, into and upon the said messuage or tenement, farm, lands, &c. wholly to re-enter, &c.

Braban entered into possession of the premises under this lease, and continued possessed of them until the entry of the defendant hereafter mentioned. A creditor of *Braban* for a just debt took from him a warrant of attorney to confess judgment, upon which a judgment was accordingly entered up as of *Michaelmas* Term 1797. Execution issued in the same term, and the lease was on the 11th of *December* 1797 sold under such execution by the sheriff to the defendant, who was put into possession on the 1st of *January* 1798, and now continues so possessed. The defendant at the time of his purchase knew that the lease contained the said covenant and proviso.

A lessee, who had covenanted not "to let, set, assign, transfer, make over, barter, exchange, or otherwise part with the indenture," &c. with a proviso that the landlord might in such case re-enter, gave a warrant of attorney to confess judgment, on which the lease was taken in execution and sold; held no forfeiture of the lease.

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Best for the plaintiff. The lessor of the plaintiff is now entitled to recover under the proviso against alienation contained in the lease. A landlord in granting a lease to a particular tenant has two objects in view; the one to secure his rent; the other to provide that the estate shall not be deteriorated in the hands of the tenant. And therefore in granting a lease he selects a tenant in whom he has confidence, and in whose occupation (he supposes) both these objects will be secured. But unless he has the means of preventing the tenant alienating, both those objects may be defeated. Covenants and conditions of this kind have always been construed strictly. *Berry v. Taunton*, *Cro. Eliz.* 331; *More's case*, *Cro. El.* 26; *Philpot v. Hoare*, 2 *Atk.* 219. Though the case of *Roe v. Galliers* (a) is different from the present, because there the question arose on the legality of a proviso in the lease that the landlord should re-enter on the tenant's committing an act of bankruptcy, which was holden to be a legal condition, yet the reasoning of the Court there is applicable to this case. And the case of *Dommett v. Bedford* (b) goes the whole length of deciding the present case. There *Bedford* gave an annuity to *Woodham* to be paid into his own hands, "it being the intent of the testator that if the same should be alienated the annuity should immediately cease and determine;" and on the bankruptcy of *Woodham* and an assignment of the annuity by his commissioners to the assignees it was holden that the annuity ceased, though it was argued that the restriction only extended to an assignment by the party himself. In truth what is called an assignment by operation of law is only such an assignment made by the authority of the law that the party himself might have made. Now as the tenant himself could not have assigned in this case, on the principle that *lex nemini facit injuriam* the law will not assign for him. In cases of bankruptcy the assignees only stand in the same situation as the bankrupt himself did; neither is the sheriff placed in a better situation than the tenant whose interest he takes in execution. But even if the Court were to decide that such a proviso as the present did not extend to an alienation by law, to an execution against the goods and chattels of the tenant, still in this case there was no adverse judgment; the tenant voluntarily executed a warrant of attorney to confess a judgment for him. And unless the landlord can enter as for a

(a) *Ante*, 2 vol. 133.

(b) *Ante*, 6 vol. 684.

breach of this condition, it will enable a tenant to do that indirectly, and perhaps fraudulently, which he cannot do directly; since, instead of assigning over a lease to a third person he may confess a judgment to him for the very purpose of enabling such third person to take the lease under an execution upon the judgment.

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Parnter contra. It may be admitted that the parties may covenant that on the event of the insolvency of the tenant the landlord may re-enter, if they choose to frame a specific covenant for that purpose, but the objection to the lessor's right of entry here is that no such covenant is contained in this lease. All the words of this proviso are applicable only to an assignment by the party himself. In cases of this kind the Courts have in general been inclined to narrow the construction of covenants against alienation, at least not to extend them beyond the words of the covenant. In *Crusoe v. Bugby* (a) it was holden that a covenant not to assign transfer set over or otherwise do or put away the lease or premises did not extend to an underlease for part of the term. So in *Fox v. Swann* (b), where the lessee covenanted not to assign without the lessor's consent, it was said that a devise of the term by the lessee was not a breach of the covenant. In the case of *Denn d. Lord Stanhope v. Skeggs* (c), where the lessor having demised to the lessee for twenty-one years, habendum to him his executors administrators and assigns, with a proviso that the landlord might re-enter if the lessee his executors &c should assign &c or suffer the same to be extended or taken in execution, the question was whether notwithstanding the proviso the land could be taken in execution against the executor of the lessee, and it was admitted by the plaintiff's counsel that the covenant not to assign &c did not extend to assignments by operation of law. Lord Mansfield's opinion, and the result of the enquiries directed by him in that case, also confirm the doctrine that without an express covenant that the lease should be void on the bankruptcy or insolvency of the lessee the lease would continue in force. And it appeared there that in the leases granted by the Accountant General of the Court of Chancery of the estates of lunatics a covenant was inserted to vacate the lease on the bankruptcy or insolvency of the lessee. If, instead of a proviso for re-entry in this case, a pecuniary penalty had been annexed to the breach of the condition, no action could have been maintained for such penalty, because the judg-

(a) 2 Bl. Rep. 766; and 3 Will. 234.

(b) Sty. 483.

(c) E. and Tr. 21 G. 3. B. R.

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ment, execution, and sale of the lease by the sheriff, are all hostile acts done by the operation of the law in invitum. Then the same rule ought to govern this case, which is the case of a forfeiture. "Cases of forfeiture are not favoured in law; *per Lord Mansfield* in *Cowp.* 805. That such a restraining covenant as the present does not extend to assignments by operation of law is clear from the case of *Goring v. Warner* (a), where Lord *Macclesfield* ruled that an assignment by the commissioners of bankrupt (lessee) was no breach of the lessee's covenant not to assign (b). Now if that be the general rule, there is no reason to make an exception in the present case on account of the lessee's having given a warrant of attorney to confess a judgment on which this lease was taken in execution, since that would be to compel a debtor to incur all the expence of a fruitless litigation in attempting to resist a demand which he knows to be just. If it be objected that the case of *Goring v. Warner* cannot be supported because the reason given for it's decision (namely, that the assignment by the commissioners was made by the authority of a statute, which will supersede any private agreement between the parties) was overruled in the case of *Roe v. Galliers*, it may be answered that the former decision is right, though the reason given for it is bad. Both those cases may stand on their own foundation. In the former there was no proviso to re-enter on the lessee's becoming a bankrupt or insolvent, and therefore the assignment under the commission of bankrupt was valid: in the latter there was such a proviso, which was holden to be good in law. This case is clearly distinguishable from that of *Dommett v. Bedford*, where it appeared to be the intention of the testator that the annuity given to the annuitant (bankrupt) should absolutely cease and determine as soon as he should be in a situation not to receive the benefit of it himself.

Lord KENYON Ch. J. Generally speaking, the grant of an estate carries with it all legal incidents, and therefore the grantee has a right to sell and convey it unless he be controlled by the terms of his grant. In the case of *Lord Stanhope v. Skeggs* Lord *Mansfield* seems to have doubted on this ground, whether or not the covenant that the executors of the tenant should not assign were void as being inconsistent with the thing granted: but in so doubting, his Lordship probably overlooked the maxim *modus et*

(a) 2 *Eq. Cas. Abr.* 100. pl. 3.

(b) *Vid. Philpott v. Hoare*, 2 *Atk.* 219; *Amb.* 480.

conventio vincunt legem; though indeed that maxim is to be taken with some qualification. For a grantor when he conveys an estate in fee cannot annex a condition to his grant not to alien, nor when he conveys an estate-tail a condition not to bar the entail. Such restrictions are imposed to prevent perpetuities: but, short of that restriction, both parties to a contract may model it in what manner they please. Though therefore the grant of an estate *primâ facie* carries with it all legal incidents, that grant may be modified according to the wish of the parties; and when we are considering the rights of the grantee, it is necessary to see what restraints have been imposed on him. That covenants may be introduced into a lease to prevent the term passing under a commission of bankrupt, or being taken in execution against the tenant, seems to be admitted; and I know that such covenants are now become very usual. In the case of *Crusoe v. Bugby* Lord Chief Justice *De Grey* said that the Courts of *Westminster* have always watched with a great deal of care to see if the particular case fell within the restraint imposed upon the tenant; if not, the party has those legal incidents belonging to the estate, and may dispose of it. Now what are the words used in this lease; that the lessee shall not let, set, assign, transfer, make over, barter, exchange, or otherwise part with, the indenture or the premises demised: but these are all acts to be done by the tenant himself. And I adopt the distinction, relied upon by the defendant's counsel, between those acts that the party does voluntarily and those that pass in invitum: judgments in contemplation of law always pass in invitum; and I see no difference between a judgment that is obtained in consequence of an action resisted and a judgment that is signed under a warrant of attorney, since the latter is merely to shorten the process and to lessen the expence of the proceedings. If the warrant of attorney itself had been a specific lien on the estate, that perhaps would have come within the words of this covenant: but it only gave the creditor power to enter up judgment against the tenant, and non constat that it would be followed up by the term being taken in execution under that judgment. Unless we were to carry this farther than the words, I do not think that this was an alienation within the meaning, of the covenant. In the course of the argument it was said that the granting of a lease was a stipulation of confidence: as between the parties themselves it is so, so much that the tenant's liability on his covenant to pay rent subsists during the continuance of the lease not-

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withstanding he may become a bankrupt and be deprived of all his property: but there is no personal confidence in the assignee of the lessee, and when he parts with the lease he also gets rid of his liability. On the whole, therefore, I cannot forbear thinking (and I have turned it again and again in my mind) that this is not a breach of the condition or proviso for re-entry, the term having been taken in execution against the tenant in invitum. If I entertained any doubts, I should wish to hear the case argued again: but I confess I have for some time considered this point as being at rest.

ASHHURST J. There are so many difficulties in the case that I wish to have it further considered. There seems to be a hardship on each side; on the landlord, who may lose the tenant in whom he placed confidence; and on the creditor of the lessee who perhaps gave him credit on his possession. The present inclination of my opinion is that this is not a breach of the condition: but I desire time to consider of the case.

GROSE J. The cases upon this subject do not quite agree in deciding what is a breach of a condition of this kind. The words in this covenant rather point to some act to be done by the tenant himself: but the giving of a warrant of attorney did not specifically operate on this property. If it had been given for this purpose, perhaps in equity it would have been considered as a fraud on the covenant in the lease. But the material consideration here is that there is no proviso that the lease shall be void in case of the insolvency or bankruptcy of the lessee: and as such a proviso is frequently inserted in modern leases, the omission of it in this case is strong to shew that the parties did not intend that this should be a forfeiture of the lease. In *Crusoe v. Bugby* the Court said that "the lessee becoming a bankrupt was a doing or putting it (the term) away," so "being in debt by confessing a judgment and having the term taken in execution, was the like;" but said that "none of these amounted to an assignment." Now if the words in this proviso were only inserted to guard against an assignment by the party himself, (and it seems to me that they were,) then according to the above case there has been no *assignment* in this case, and consequently no breach of the condition.

LAWRENCE J. If the Court should ultimately be of opinion that this is not a forfeiture of the lease, and I think that is the better

better opinion, this will be the first case in which the point is so decided. This question has been agitated at various times. So far back as in *Dyer* 6. a. there is this note in the margin; "A man leased for years upon condition that the lessee should not assign it over: the lessee acknowledged a statute; the term is extended; *Walters* cited this, resolved to be a breach of the condition, although they come in in the post and by act of law." In the case in 1 *And.* 124. there was a difference of opinion among the judges; it was said by one of them that if land be leased on condition not to assign, and the lease be taken in execution by reason of a judgment or recognizance, it is not a forfeiture: but this was denied by another of the judges, who said that the execution was itself a forfeiture; to which the reporter adds "which is hard, as it seems." The same case is also reported in 1 *Leon.* 3. according to which *Periam* J. and *Meade* J. held that it was not an alienation against the condition. In 2 *Leon.* 83., where a man devised lands to his wife until his son *William* attained the age of twenty-two, and then the remainder of part of the lands to his two sons *A.* and *John*, upon condition that if any of his sons should sell any part before *William* attained the age of twenty-two he should lose the lands &c, it was said "If the devisee had entered into a statute to the value of the land leased, by the intent of the will the same had been a sale; and such was the opinion of the whole Court." These are the earlier cases on this subject; the later cases have been mentioned in the argument. That of *Goring v. Warner*, which was cited from 2 *Eq. Cas. Abr.* 100., is also in 7 *Vin. Abr.* 85. pl. 9., where Lord *Macclesfield* said "I do not think this is a breach of the proviso or condition at law, but whether it be so or not I think this is a proper case for relief in a Court of Equity." The case of *Dommett v. Bedford* is very distinguishable from the present; for there it was the testator's intention that the annuity should be paid to the annuitant so long only as the latter should be able to receive it; and when the bankrupt could no longer receive it, there was an end of the term for which the annuity was given. With regard to the case of *Roe v. Galliers*; it was directly contrary to the opinion given by Lord *Macclesfield* in *Goring v. Warner*, because it was there holden that a covenant that the lease should be void in case the lessee became a bankrupt was good. Now looking through all these cases, it does not appear that this precise point has been decided. According to what was said in *Crusoe v. Bugby* this would be a putting away, or part-

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devise and dispose of the same in the following manner; Imprimis, I give and devise unto my wife *S. Camper* all my lands houses &c., freehold copyhold and leasehold whatsoever and wheresoever, and to receive the rents and profits thereof during her life; and also all my deeds mortgages bonds and writings, and also all my stock goods chattels effects and personal estate whatsoever and wheresoever, she paying thereout the legacies hereinafter given. And I hereby nominate and appoint my wife *S. Camper* sole executrix of this my will. And after her natural life my mind and will is and I do hereby order direct give devise and bequeath all my lands houses &c. freehold copyhold and leasehold in manner following; I give and devise unto my grandson *James Wright* all my lands freehold copyhold and leasehold in the county of *Essex* (except herein excepted and reserved the house I now live in) with all the lands yards outlawry stables and all other conveniences and appurtenances thereunto belonging and to be hereinafter disposed of. Also I give and devise unto my grandson *James Wright* all my estate freehold and copyhold lying and being in *Ellington* in *Huntingdonshire*. And also I give devise and bequeath unto my grandson *John Wright* all my estate lands &c. known and called by the name of the *Coal Yard* in *St. Giles's, London*. Also I give and devise unto my grandson *John Wright* the sum of 500*l.* to be paid six months after my decease. Also I give and devise unto my grandson *James Camper* the house I now live in with all the lands yards outhouses and all the appurtenances belonging to the same; and also all my houses and lands commonly called and known by the name of *Castle-Yard* in *Holborn, London*, and now in the tenure or occupation of *G. Oldmixon Esq.*" The testator duly surrendered such part of the premises in question as are copyhold to the use of his will; and afterwards died in *January 1763*, leaving *S. Camper* his widow and his three grandsons *James Wright*, *John Wright*, and *James Camper*, devisees in the will, him surviving, which said *James Camper* was also his heir at law. Upon the testator's death his widow *S. Camper* entered into possession of the freehold and copyhold lands in the county of *Essex*, and continued in possession of the same together with the other property devised to her during her life; and upon her death *James Wright* the testator's grandson entered into possession of the lands in *Essex*, and continued in possession until his death, which happened in *July 1795*; whereupon the defendants entered into and are now in possession

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thereof as the devisees of the said *James Wright*. The defendant *James Camper Wright* has been duly admitted to the copyholds. *James Camper* the grandson and heir at law of the testator died in 1768, intestate as to the freehold and copyhold lands in *Essex*, leaving *Mary Child* one of the lessors of the plaintiff his only child and heir at law and also heir at law of the testator.

Leach, for the plaintiff, was to have contended that *James Wright* the grandson took only an estate for life in remainder in the premises in question after the widow's death; and that upon his death they descended to the heir at law of the devisor (a). But the Court desired the defendant's counsel to begin.

Trower, for the defendants, argued that considering the whole will together it appeared to be the devisor's intention to give an estate in fee to *James Wright*. Though general introductory words in a will, manifesting an intention to dispose of the whole interest in the property, are not in themselves sufficient to carry a fee, yet they have always been considered of great weight in the construction of the subsequent devises. Here the devisor begins by expressing his intention to dispose of such *worldly and personal estate* as it had pleased God to bless him with. *Worldly* is there put in contradistinction to *personal*, and must therefore mean *real estate*. And accordingly he immediately after enumerates *lands, houses, &c.* Besides the word *estate* alone is sufficient to carry a fee in the land. And so will the expression "all I am worth (b)." It is also observable that this is not an immediate devise, but a devise of a remainder without any further limitation over: and when the devisor meant to give only an estate for life, he expressly said so. Further, he has clearly given his grandson a fee in the estate in *Huntingdonshire* by the devise of *all his estate* freehold and copyhold, &c; and this is coupled with the devise of the premises in question in *Essex* by the word *also*. In the devise in question he also gives all his lands, freehold, copyhold, and *leasehold*; which clearly passes the whole interest in the latter; and there is no ground for supposing that the devisor meant to give the absolute property in the one and only an estate for life in the other. In *Denn v. Mellor* (c) this Court held that by a devise of "all the rest of my lands, tenements, and hereditaments either freehold or copyhold, and also all my goods &c, after payment of my just

(a) Vide *Right v. Sidebotham*, Doug. 759.
and *Doe v. Buckner*, ante, 6 vol. 610.

(b) *Huxtep v. Brooman*, 1 Bro. Ch. R. 437.

(c) *Ante*, 5 vol. 558, and 6 vol. 175.

debts and funeral expences," only an estate for life passed, for want of words of limitation to carry a fee: but that judgment has since been reversed in the Exchequer-chamber; not on the ground that the word *hereditaments* was of itself sufficient to carry a fee, but because from the general context of the will such appeared to have been the deviser's intent,

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Lord KENYON Ch. J. On the reversal of the judgment in *Denn d. Moor v. Mellor* I can make no observation, never having heard of it until this moment, and not knowing even now on what grounds the judgment given in this court was reversed. The principal argument in that case arose, not on the word "hereditaments" but, on the words which created a charge on the real estate for the payment of debts; but now it is supposed that our judgment was reversed not on any one ground in particular on which the case was here decided but on the whole will taken together.

It has frequently been lamented that the same technical words were not required in wills as in deeds; because had such a rule been adopted few questions would have arisen on the construction of wills. Some rules however have been established by a series of decisions on this subject; and we should be removing land-marks if we were to abandon that, which has been adopted as a rule of property, in the pursuit of a doubtful intention of a testator. In *Ibbetson v. Beckwith* (a) it was said that general introductory words in a will, like those used in this instance, shewed that the testator had his whole estate in view at the time; but it is now clearly settled that those words are not of themselves sufficient to carry a fee. Perhaps it would be too critical to advert to particular expressions in a will of this kind, drawn by a person ignorant of the profession: but it is observable that in almost all the other clauses of the will the testator used the word "estate," which is sufficient to pass a fee. He has not however used that word in the clause on which this question arises, nor any word equivalent to it; and there is no part of the will that enables me to decide, consistently with the authorities, that *James Wright* took a fee in the premises in question. Certain rules have been adopted, by which the real property of this county has been governed for ages, and it would be too much for us now to overset them. Therefore I am of opinion that *J. Wright* took only an estate for life.

(a) *Cas. Temp. Talb.* 157.

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ASHHURST J. It is better for the public that the intention of one individual should be defeated than that a series of decisions, on which the real property of this county depends, should be shaken. *Stare decisis* is a maxim in our law. Where there is a general devise of land, without any words of inheritance, the law says that the devisee shall only take an estate for life; and such is the present case.

GROSE J. of the same opinion.

LAWRENCE J. I cannot find any words in this will, from whence I can discover with certainty that the deviser intended to give more than an estate for life in this case.

Postea to the plaintiff.

Saturday,
Nov. 24th.

The KING *against* The Inhabitants of GREAT
YARMOUTH.

An unmarried woman may be removed to the place of her settlement on account of her being pregnant, under stat. 35 G. 3. c. 101. s. 6., even though she be residing under a certificate from her own parish.

TWO justices by an order removed *Mary Pestill* widow from the parish of *Great Yarmouth* to the parish of *Ditchingham* in *Norfolk*; and on appeal the Sessions quashed the order for informality, not stating any case for the opinion of this Court. But in the order of removal it was recited, and adjudged, that the pauper was with child which was likely to be born a bastard, that she was living in *Great Yarmouth* not having gained a settlement there, that "she was deemed to be a person actually chargeable to the parish of *Great Yarmouth*," and that her place of settlement was at *Ditchingham*; without negating her having a certificate from any parish. Both the orders having been removed here by certiorari,

Law obtained a rule to shew cause why the order of Sessions should not be quashed: against which

Mingay and *Hulton* now shewed cause; who, after stating the question intended to be raised in this case to be whether or not the statute 35 Geo. 3. c. 101. s. 1. (a) extends to an unmarried woman who is residing under a certificate, argued in the negative; because no mention is therein made of certificated persons; and be-

(a) By the 6th sect. of that act, which is intitled "An act to prevent the removal of poor persons until they shall become actually chargeable," it is provided that "every unmarried woman with child shall

be deemed and taken to be a person actually chargeable within the intent and meaning of the act to the parish in which she shall inhabit, and may be removed as such to the place of her last legal settlement."

cause the object of that statute in general was to give privileges to paupers not to take any away from them. That therefore this act ought not to be extended by implication beyond the words of it, in order to abridge the privileges of any paupers. That, if the act did not extend to certificated persons, the order of removal was defective, in not negating that the pauper was living at *Great Yarmouth* under a certificate; for that in *R. v. St. Mary Westport* (a) it was ruled that the pregnancy of a certificated person was no ground for removing her as a person actually chargeable, and consequently if this pauper were living under a certificate she was not liable to be removed.

Per Curiam. The orders, which alone are before the Court, are scarcely sufficient to raise the question that (it is said) was meant to be agitated. But even if they were, this pauper comes within the words of the statute alluded to, which are general, "every unmarried woman," &c, and also within the reason of the act. This clause seems to have been introduced for the very purpose of remedying what was before an apparent defect in the poor-laws; for before that act passed a certificated person in this situation could not have been removed, although the child when born would be settled in the certificated parish. Therefore as the words of the statute are sufficiently comprehensive to include this case, there is no reason why we should narrow or abridge the construction of them so as to prevent their extending to a case that wanted the remedy.

Rule absolute.

(a) *Ante*, 3 vol. 44.

GLAISTER *against* HEWER and two Others.

Saturday,
Nov. 24th.

THE plaintiff brought an action of trover against the defendants, who suffered judgment to go by default, and on executing the writ of inquiry the jury gave 40*l.* damages. Afterwards the defendants sued the plaintiff, and recovered 36*l.* 13*s.* 6*d.* Whereupon the defendants obtained a rule, calling on the plaintiff to shew cause why the proceedings in the former action should not be stayed on the defendants undertaking to deduct and allow to the plaintiff 40*l.*, the amount of the damages recovered by him, and the costs when they should be ascertained by the Master, by entering a remittitur for the amount of such damages on the record in the action brought by the defendants, on an affidavit that the

The Court will permit the defendants to set off a judgment, recovered by them against the plaintiff, against a judgment obtained by the plaintiff against them, notwithstanding the plaintiff may also have a separate demand on one of the defendants.

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sum of 36*l.* 13*s.* 6*d.* (the damages recovered by the defendants) together with the costs of the latter action which had not yet been taxed would, when taxed, considerably exceed the damages and costs recovered by the plaintiff against them.

Gibbs and *Park* now shewed cause against that rule. 1st, At all events the rule is too general, because the plaintiff's attorney has a lien on the judgment recovered by him for his costs, which ought not to be disturbed in a dispute between the parties. [*Law*, who was on the other side, admitted that this rule must be subject to the attorney's lien.] 2dly, The defendants are not entitled to set off their judgment against that which the plaintiff recovered against them, because the plaintiff has another demand against *Hewer* one of the defendants (a). In the case of *Mitchell v. Oldfield* (b), where the plaintiff had recovered a judgment against the defendant, the Court permitted the latter to set off a judgment which he had recovered against the plaintiff and another person against the judgment obtained against him. Then by a parity of reason, as the plaintiff has a separate demand against one of the defendants in this case, it will be unjust that the defendants should set off their judgment against that recovered by the plaintiff without also taking this second demand into the account. This is an application to the equitable jurisdiction of the Court, who will therefore be guided by the rule that is adopted in a court of equity, that he who asks equity must do equity. But

The Court thought that this would be carrying the rule too far; for that the effect of discharging this rule would be to subject the two other defendants to the payment of a separate debt of *Hewer*.

Rule absolute (c).

(a) It appeared in an affidavit produced on shewing cause that *Hewer*, one of the defendants, was indebted to the plaintiff in 67*l.* on two promissory notes drawn by *Hewer*, one payable to the plaintiff, and the other to *Smith* and Co. or order and by them indorsed to the plaintiff.

(b) *Ante*, 4 vol. 123.

(c) Subject to the lien of the plaintiff's attorney; and it was referred to the Master to see what was the extent of that lien.

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Saturday,
Nov. 24th.SIMEON *against* THOMPSON.

THE defendant, being under terms to plead *issuably* in an action on a policy of insurance, pleaded the general issue, and also that the owners of the goods, *De Vries* and Company, for whom the plaintiff as agent had insured, were alien enemies; whereupon the plaintiff signed judgment as for want of a plea; and a rule having been obtained calling upon him to shew cause why the judgment should not be set aside for irregularity,

Giles shewed cause, on the ground that the rule for pleading *issuably* was always considered as requiring the defendant to plead to the merits, and the plea of alien enemy was not such a plea, but was merely calculated for delay. In *Feron v. Ladd* (a) the Court refused to let the defendant plead *non assumpsit* and that the plaintiff was an alien, the latter being, as they said, an unconscientious plea and not to be favoured. And it is the less to be favoured here, because the owners of the goods are indebted to the plaintiff, and he has obtained a license under the late act of parliament (b) to receive the money on their account.

Park, in support of the rule, contended that this was not an unconscientious plea, because the Legislature themselves had by an existing law declared the impolicy of suffering the subjects of this country to make payments to the enemy, as furnishing them with additional means for carrying on the war; and this plea was a means of enforcing the observance of that act. And in *Brandon v. Nesbitt* (c) a replication to such a plea by the plaintiff, (who stood in the same character of agent,) that the principal was indebted to him in more money than the amount of the insurance, was holden bad on demurrer. At any rate it must be considered as an *issuable* plea within the terms of the order, as the plaintiff might have taken issue on it and gone to trial.

LORD KENYON Ch. J. The meaning of the term "*pleading issuably*" in a judge's order is not merely the pleading a plea on which issue may be taken, but such an one as goes to the merits: but this is purely for delay, and does not at all affect the merits of the question between these parties. The case of *Brandon v. Nesbitt* was determined on demurrer, where the party had a right to insist on every legal objection; and the question did not arise upon

Under a judge's order to plead *issuably*, the defendant can only put in a plea which goes to the merits. — The plea of alien enemy is not such a plea.

(a) 2 Black. Rep. 1326.

(b) Vid. 34 Geo. 3. c. 79.

(c) Ante, 6 vol. 23.

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an order to plead issuably. No injury to the public can arise from rejecting this plea; for if the owners of the property insured be indebted to the plaintiff, as stated by him, he will have an opportunity of reimbursing himself out of the money recovered; but whether that be so or not, the money cannot be remitted out of this country without a license from the Secretary of State.

Rule discharged.

But afterwards the plaintiff agreed to wave his judgment on certain terms.

Saturday,
Nov. 24th.

WILLIAMS and Another *against* LADNER.

Though the proprietor of tithes leave them on the land more than a reasonable time after they are set out and after he has notice thereof, the owner of the land cannot justify in trespass turning in his cattle upon the land to depasture it in the usual course of husbandry, whereby the cattle consumed the tithes: but his remedy is either by distress or by action.

TRESPASS for that the defendant on 1st *September* 1797 and on divers other days between that and the day of exhibiting the bill of the plaintiffs with force and arms and with divers cattle ate up consumed trampled upon and damaged large quantities of corn grain and straw of the plaintiffs at the parish of *St. Levan* in *Cornwall*; and 2dly, for seizing taking and carrying away the same. Pleas: 1st, Not-guilty. 2dly, That the defendant before and at the several times when &c. was lawfully possessed of and occupied divers, to wit, 500 acres of his own land in the said parish and county; and that there now is and from time immemorial hath been a custom in the parish, that such of the occupiers of land therein for the time being respectively as have had at any time corn growing thereon who have thought fit to give notice in writing before they have set out the tithe of such corn after the cutting down of the same that they should so set it out, and of the times when they should so do, unto the owners or proprietors of such tithes for the time being, by affixing such notice on or before the *Sunday* previous to their so doing on the outside of the door of the parish church, have given such notice at such time and in such manner and have set out such tithe accordingly on the lands &c for the use of the owners or proprietors thereof. And that the defendant whilst he so occupied the said lands and before any of the said times when &c., to wit, on 1st *August* 1797, cut down a large quantity of corn then growing thereon (to wit) &c, and afterwards and before any of the said times when &c gave previous notice in writing on the 16th of *September* 1797 (according to the custom) to the plaintiffs, being the owners and proprietors of the same tithe, that he should set out the tithe on *Friday* then next should the weather then permit, and

that he did then accordingly *viz.* on the 22d of the said *September* (the weather permitting) set out the same on the said land according to the notice for the use of the owners or proprietors thereof, that the plaintiffs had notice of the tithes being so set out on the same day, and that the defendant then and there carried away the other nine parts; but the plaintiffs did not carry away the tithe within a reasonable time after they had notice that it was so set out, but on the contrary wrongfully permitted the same to remain and the same did wrongfully lie and remain upon the said land for a long space of time after the expiration of such reasonable time, to wit, continually and from thenceforth until and at the said several times when &c. The plea then set forth the like matter as to other corn cut down whereof the tithe was set out, in the same manner and with notice similar to the other but more particular as to the times and places of cutting down the corn and setting out the tithe; and because the defendant at the several times when &c, each of them being after the expiration of the said several reasonable times to wit, at &c. could not depasture the grass there then growing on the said land whereon the said tithe was so set out and remained as above-mentioned, nor use the same in so ample convenient and beneficial manner as he otherwise might and ought to have done, according to the usual and regular course of husbandry, without turning the cattle in the declaration mentioned into the said land to depasture the grass there then growing nor without moving the said wheat &c in the last count mentioned to a convenient distance, he the defendant at those several times did for the purpose of depasturing the grass growing on the said land, and using the same in such ample convenient and beneficial a manner as aforesaid, according to the usual and regular course of husbandry, turn the said cattle upon the land and remove the said wheat &c; and the said cattle of their own accord ate up and damaged the same &c, he the defendant doing as little damage as on those occasions he possibly could consistently with his so depasturing &c. The third plea stated generally that the defendant was possessed of the land in the said parish, that he cut down the corn growing thereon, and set out the tithe, and that on the same day &c the *plaintiffs had notice* that the tithe was set out, but did not carry away the same; and concluded as the former plea.

To the two special pleas there was a demurrer; assigning for causes that they only stated generally that the plaintiffs had notice that the tithes were set out, without shewing how or in what man-

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ner they had notice, or that the same was given by or on the behalf of the defendant; and also as to the last plea that the defendant had not alleged that the plaintiffs were the owners or proprietors of the tithes, or the proper persons to whom such notice ought to have been given. Joinder in demurrer.

Praed was called upon to support the pleas, and was asked whether the point had not been decided by the judgment of the Court in *Shapcott and Mugford*, 1 *Ld. Raym.* 187. He said that upon examining that case it would be found that the question came collaterally before the Court, who decided it with a leaning to support the verdict, which might have been maintained on other grounds. For there was no doubt but that the plaintiff, who was the land-owner, had a right to maintain his action and recover damages against the defendant, who was the tithe-owner, for having suffered the tithe to remain more than a reasonable time on the land to the detriment of the herbage. But admitting that the Court did decide the very point now in question, (though it was not necessary for them to do so,) still the judgment may not be deemed conclusive, if it be contrary to the general principles of law, reason, and convenience, or to other authorities and the opinion of other judges on the same point. The case on the pleadings now before the Court is shortly this. The plaintiffs, the tithe-owners, complain that the defendant's cattle have destroyed their tithes. The defendant, the land-owner, says that the tithes were duly set out on his land, of which the plaintiffs had notice, that a reasonable time for removing them passed, and then the defendant put his cattle into his land to depasture it, and the cattle ate the tithes. The result is that the plaintiffs have suffered a loss owing to their own default or neglect. But it is a general principle of law that a loss or hurt, which happens to a man by his own default or neglect, gives him no right of action. The plaintiffs by leaving the tithes on the land after notice that they were set out more than a convenient time for taking them away became wrong-doers and liable to an action. Then it is not reasonable that the defendant should be deprived of the use of his land by the continuance of that which is wrongful on the part of the plaintiffs, or make amends to the plaintiffs for a loss arising from their own wrong. And it would be inconvenient, not to the land-owner alone, but to the public also, that land should remain useless as to the purposes of pasturage or agriculture; which will be the case, if the land-owner may not feed it with his cattle or till it so long as the tithe-owner may leave the
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tithe there through negligence or obstinacy. If the matter here pleaded would be an answer to a suit in the Spiritual Court for tithes, it should be a sufficient defence here in an action for the value of them, otherwise the judgment of the two Courts would be inconsistent. But it seems from the judgment in *Bennet* and *Shortwright* (a) that this matter would be a good answer to a suit in the Spiritual Court; for on the motion then made for a prohibition this Court expressly said that if the parishioner setteth out his tithes and the parson will not take them, or if they be destroyed by cattle by his laches, he shall not have tithe again. (Lord *Kenyon* said it might be true that the parson should not have tithes in kind a second time, but that did not shew that he should not have a remedy for the destruction of his tithe first set out which had become his property.) The Court in the case of *Webb v. Paternoster* (b) adopted and proceeded on the principle, which it is submitted should govern this case. Sir *William Plumer* had given license to *Webb* an off-going tenant to leave a rick of hay on the land until he could conveniently sell it, and sometime afterwards leased the land to *Paternoster*, who two years after the license without notice to *Webb* put in his cattle, which ate the hay: *Webb* brought an action of trespass against him, and these facts appearing to the Court on the pleadings, they gave judgment after much argument and consideration for the defendant, it being the plaintiff's fault to leave the hay more than a convenient time. So here the law allowed the plaintiffs to leave the tithes on the land a convenient time, and it was their fault to leave them longer. It is remarkable that in considering that case *Dodrridge J.* put the case now before the Court as an instance to illustrate the principle. He said (2 *Roll. Rep.* 143, 144.) If a parson suffer his tithe to lie on the land, shall not the owner put his beast on the land? inferring that he might; and Sir *H. Montague* Lord Ch. J. assented, stating the reason that it is the parson's folly. The same principle had been recognized and acted upon before in a case very analogous. It is thus reported (c); In error it was said to be law that if all the neighbours of a vill carry their corn out of the common field, except one who will not carry his through obstinacy or negligence, there the rest may put their beasts into the field and shall not be trespassers to the other. In *Dobson v. Oliver* (d) the

(a) 2 *Leon.* 101.(b) *Palm.* 71. 2 *Roll. Rep.* 143. 152.
Godb. 282. *Popb.* 151. S.C.(c) *Bro. Abr.* tit. *Trespass.* 352.(d) *Bunb.* 74.

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law respecting the tithe of milk is thus stated; if there be no particular custom or usage, the parishioner is obliged to pay every tenth meal, to milk his cows at the usual place of milking into his own pails, and the parson is obliged to fetch it away from the milking-place in his own pails in a reasonable time; and if he do not fetch it away before the next milking-time, the parishioner may justify pouring the milk on the ground, because he then has occasion for his own pails. The same argument holds here. A reasonable time for removing the tithe had passed; the defendant had occasion to use his land, and therefore may justify putting in his cattle. The destruction of the tithe in either case arises from the default or neglect of the tithe-owner.

Gaselee, contra, was stopped by the Court.

LORD KENYON Ch. J. This is a question of universal concern: but as the point appears to have been solemnly decided in the Court of Common Pleas near a century ago, and that judgment was founded on a prior case in the 22 *Car. 2.* in this court, I think it ought not now to be disturbed. That decision is also supported by reason; it is much better that the owner of the land should appeal to the laws of his country for redress than that he should take the law into his own hands. If the defendant were to succeed in this case, it would establish this proposition, that if cattle stray on the property of any person he may destroy them: but he is bound to drive them out in a reasonable manner. Here the defendant might either have brought an action against the plaintiffs for not taking away the tithes, or he might have distrained the tithes damage feasant. Without however inquiring into the reasons on which the case in 1 *Ld. Raymond* 187. proceeded, it is sufficient for us to say that that case was fully considered, and that it was there decided that the owner of the land cannot turn out his cattle before the tithes are removed, but must resort to his action; and every case that inculcates the principle, that a party should apply to the law rather than take the law into his own hands, ought to be adopted in courts of justice.

LAWRENCE J. I think there is a great deal of reason in the argument urged on behalf of the defendant in this case: but it would be too much for us to overset that case in *Ld. Raymond*, in which this point was decided.

Per Curiam

Judgment for the plaintiffs.

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Monday,
Nov. 26th.CORT *against* JACQUES.

INTERLOCUTORY judgment having been signed in this case for want of a plea,

Confe obtained a rule nisi for setting aside that judgment and all subsequent proceedings for irregularity, because the notice served on the defendant was of a declaration generally on the 6th of November (being the return-day of the writ) before any appearance entered, instead of a notice of a declaration de bene esse. And he cited *Cook v. Raven* (a), to shew that a demand of a plea before the defendant has appeared or the plaintiff has filed common bail for him is a mere nullity. So this, which was in effect a notice of a declaration in chief before appearance, was a nullity also, and therefore the defendant was not bound to plead to it. In *Smith v. Painter* (b) it was holden that the plaintiff may deliver a declaration against the defendant *conditionally* before the time for his appearing was past, and file common bail for him; but that after that time he must bring the defendant into court before he can declare in chief, which necessarily implies that he cannot do so before; and here the plaintiff must be bound by his notice delivered, for upon that alone the defendant acts.

Marryat, in shewing cause, relied on the fact that though the notice was of a declaration generally, yet that the declaration filed in the office was in fact indorsed filed conditionally, and therefore regular. The defendant was bound to have searched in the office, where he might have seen that the proceeding was regular. And

The Court were of that opinion. Wherefore

Rule discharged.

(a) *Ante*, 1 vol. 635.

(b) *Ante*, 2 vol. 719.

DESBOROUGH *against* COPINGER.Monday,
Nov. 26th.

THE defendant was holden to bail on an affidavit, in which the plaintiff had omitted to negative any tender of the debt in bank-notes, according to the late act of the 37 Geo. 3. c. 45. and

too late for the defendant to object to the affidavit on which he was holden to bail, that it omitted to negative any tender of the debt in bank-notes, as required by the 37 Geo. 3. c. 45.

The objection should be made in reasonable time after the error committed.

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the

After notice of executing a writ of inquiry on a judgment by default it is

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the defendant suffered judgment by default. After receiving notice of executing a writ of inquiry, he obtained a rule, calling on the plaintiff to shew cause why he should not be discharged on filing common bail, on account of the insufficiency of the affidavit to hold to bail.

Bayley shewed cause; and contended that the objection came too late, after interlocutory judgment; and that the defendant ought to have applied in an earlier stage of the proceedings after the error was committed.

Erskine and *Lawes* in support of the rule. The act of Parliament being peremptory, the Court have no discretion; and unless the defendant do some act himself to wave the objection, as in *Norton v. Danvers* (a) by voluntarily giving a bail-bond, or as in *Levy v. Daponte* (b) by pleading, he is at liberty to take advantage of it at any time. In *Fenwick v. Hunt* (c) the length of time was holden to be no objection. But

Per Curiam. In the last case (d) on this subject, which was subsequent in point of time to that of *Fenwick v. Hunt*, it was decided that such an objection as the present must be taken at an earlier stage of the cause. Here the defendant has suffered the plaintiff to proceed through subsequent stages of the cause on a presumption that every thing was regular before, when he ought to have objected in the first instance to the irregularity on which he now insists.

Rule discharged.

(a) *Ante*, 7 vol. 375. (b) *Ib.* 376. n. (c) *Ib.* n. a. (d) *Levy v. Daponte*, *ib.*

Tuesday,
Nov. 27th.

WEAVER *against* BUSH.

To trespass for an assault and battery, the defendant may plead that the plaintiff with force and arms and with a strong hand endeavoured forcibly to break and enter the defendant's close, whereupon the defendant re-

sisted and opposed such entrance &c, and if any damage happened to the plaintiff it was in the defence of the possession of the said close.

TO trespass for assaulting and beating the plaintiff with a stick, the defendant pleaded (besides the general issue and son assault which were found for the plaintiff) that "as to the assaulting of the plaintiff and beating bruising and ill-treating him and with the said stick giving and striking him the said blows &c, he (the defendant) at the time when &c was lawfully possessed of and in a certain close called &c at &c; and being so possessed, the plaintiff at the said time when &c *with force and arms and with a strong hand* as much as in him lay *did attempt and endeavour forcibly to break into and enter the said close* of the defendant and

would have broken into and entered the said close without the defendant's license and against his will, whereupon the defendant being then in his said close, and seeing the said attempt and endeavour of the plaintiff did *then and there resist and oppose such entrance* into the said close, and upon that occasion did then and there defend his possession, as it was lawful for him to do, and that if any damage or injury then and there happened to the plaintiff it was in the defence of the possession of the said close."

To this plea the plaintiff replied *de injuriâ suâ propriâ absque tali causâ*; the issue on this plea was found for the defendant.

Lens having on a former day moved to enter up judgment for the plaintiff, notwithstanding the justification in the third plea which was found for the defendant, on the ground that that plea could not be supported, on the authority of *Jones v. Tresilian*, 1 *Mod.* 36., where *Twisden* J. said "you cannot justify the beating of a man in defence of your possession, but you may say that you did *molliter manus imponere*" &c,

Bond, Gibbs, and Dampier, now shewed cause against that rule. 1st, A party may justify an assault and battery in defence of his house or possession. *Com. Dig.* tit. *Pleader* 3. *M.* 17; 2 *Rol. Abr.* 548. *pl.* 2; and 549, *pl.* 9, 10; and *Bro. Abr.* tit. *Trespass.* *pl.* 128. In 2 *Inst.* 316. it is said that a man may justify an assault and battery in his own defence, or for the preservation of his possession of lands or goods, but he cannot justify either mayhem or wounding. The contrary position, cited from 1 *Mod.* 36., is merely the dictum of *Twisden* J., not the resolution of the Court: the only point there determined was that *mollitur insultum facere* was a contradiction in itself. 2dly, Even if a defendant could not in general justify an assault and battery in defence of his possession, yet the plea in this case may be supported, as the plaintiff "with force and arms and with a strong hand endeavoured forcibly to break into the defendant's close"; it was lawful for the defendant to resist force by force. In *Green v. Goddard* (a) this very distinction was taken; the Court there said, if one enter into my ground I must request him to depart before I can lay hands on him to turn him out: but in the case of actual force it is lawful to oppose force to force; "and if one break down the gate or come into my close *vi et armis*, I need not request him to be gone but may lay hands on him immediately, for it is but returning violence with violence." So in *Owen* 150. it is said that a man may

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use force in defence of his goods. And here it is admitted on the record that the plaintiff was using actual force. 3dly, But if the plea be defective, it is merely a defect in form, which should have been shewn as a special cause of demurrer, and cannot be taken advantage of in this stage of the proceedings.

Dallas and *Lens* in support of the rule. The cases cited on behalf of the defendant need not be disputed, because they only shew that a defendant may justify an assault and battery in defence of his possessions. But they do not prove that such a plea as the present is good; on the contrary, the doctrine contained in all of them is that though the defendant may justify in such cases he must justify by pleading "molliter manus imposuit." Even in the case cited from *Salk.* 641. to shew that the defendant may resist force by force, and where the plaintiff was using force "manu forti" &c, the defendant pleaded that he parvum flagellum super querentem molliter imposuit. In the case cited from 1 *Mod.* 36. the point determined was not merely that the plea was contradictory, but that a battery could not be justified in defence of possession. So in *Leward v. Basely* (a,) where that case was recognized, a distinction was taken between a justification in defence of the person and of the possession; that in the former case, the defendant might plead insultum fecit, but that in the latter he ought to plead mollitur manus imposuit. The correct mode of pleading in such a case as the present is stated in *Skevill v. Avery* (b), where to an assault and battery the defendant pleaded that the plaintiff entered his house and would have thrust him out of the possession thereof, whereupon he molliter manus imposuit to put him out, and the harm if any done was in defence of his own possession. And if this objection be well founded, it is not merely an objection of form but of substance, and therefore may be taken advantage of now. It is a substantial objection, because the defendant has done that in the first instance which he would only have been justified in doing in case an attempt to resist the plaintiff by more gentle means had proved ineffectual. With regard to the case cited from *Owen*, 153, it may be observed that *Williams J.* there said "It hath been adjudged in *Banham's* case that a man cannot justify a battery in defence of his soil."

Lord KENYON Ch. J. It would be extraordinary if this plea could not be supported, because it simply states that fact which (it seems admitted) the defendant might justify doing. The plain-

(a) 1 *Ld. Raym.* 62.(b) *Cro. Car.* 138.

tiff cannot succeed in this application unless he can shew that the words *molliter manus imposuit* are mere technical words. A party may resist and oppose force by force in defence of his possession, if necessary: if the resistance be excessive, the plaintiff may shew that in a new assignment. But I confess it appears to me that the plea may be supported.

LAWRENCE J. The general form of pleading certainly has been as the plaintiff's counsel contend; and on this ground, that the defendant ought not in the first instance to begin with striking the plaintiff, but the law allows him either in defence of his person or possessions to lay his hand on the plaintiff, and then he may say if any further mischief ensued it was in consequence of the plaintiff's own act; so that the battery follows from the resistance. But it does not necessarily follow from any thing stated in this plea that the defendant did more than gently lay his hands on the plaintiff in the first instance; and if not, this plea may stand consistently with all the authorities. I admit that the cases cited are strong to prove the position contended for by the plaintiff; those in 1 *Mod.* 36, and *Salk.* 641; and there is another in 2 *Lutw.* 1481. that is stronger than either of them. There to a plea of son assault the plaintiff replied that he was a servant of *W. Sandys*, employed to take care of his horses, and that the defendant with a bill endeavoured to beat and wound one of the horses when the plaintiff, in order to defend the said horse, put his hands on the defendant who thereupon beat the plaintiff &c; and it was holden that this replication was bad, because it did not allege that the defendant had beaten the horse before the plaintiff put his hands on the defendant. That goes the length of saying that the party cannot even plead *molliter manus imposuit* in defence of his possession, unless there has been something more than a mere attempt to beat him. But in the way in which I have considered this plea, I think it may be supported consistently with all the authorities.

Per Curiam

Rule discharged.

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Tuesday,
Nov. 27th.DARBY and Others *against* SMITH Assignee of PRIEST,
a Bankrupt.

Goods, the property of a widow and children, were upon her second marriage assigned to trustees, in trust to suffer the husband to enjoy them, on condition he should pay to the trustees for the use of the children 800 l. by yearly instalments of 100 l. from July 1789; he continued in possession of them till 1797, having paid only 250 l.; the day before his bankruptcy the trustees repossessed themselves of the goods: held that this was fraudulent as against creditors, and that the assignee of the bankrupt was entitled to the goods under the 21 Jac. 1. c. 19.

THE matters in difference between the parties in this cause having been referred to arbitration by a rule of Court, the arbitrator made his award, in which he stated all the facts of the case. It recited that the action was brought against the defendant to recover the value of certain goods, being the household furniture in the house of the said *Peter Priest*, (the bankrupt for whose estate the defendant was chosen assignee) sold by the defendant as such assignee; and that it appeared upon the evidence adduced that the said goods were the property of the wife of *P. Priest* and of her children by a former husband before her intermarriage with *P. Priest*; and that upon her marriage they were assigned to the plaintiffs, in trust to suffer *P. Priest* to enjoy them, on condition that he should pay to the plaintiffs for the use of the children of Mrs. *Priest* 800 l., by yearly payments of 100 l. each on the 11th of July in each year, beginning those payments on the 11th of July 1789. It then recited that 250 l. only of the 800 l. was paid on the 9th of July 1797, notwithstanding which the plaintiffs suffered the goods to remain in the house of *P. Priest*, and permitted him to have the possession order and disposition and the apparent ownership thereof until the evening of the 9th of July 1797, when they put a man in possession thereof in the house of *P. Priest*; and that in the morning of the 10th of July *P. Priest* committed an act of bankruptcy, by absconding from his house, upon which he was afterwards declared a bankrupt. And because it appeared to the arbitrator that the plaintiffs had no right to take possession of the goods on account of the arrears which were due on the 9th of July 1797, because it was fraudulent in them as against creditors to permit *P. Priest* to have the possession of the said goods after those arrears became payable, and afterwards to take possession of them on account of those arrears, because it appeared to the arbitrator that they had no right to take possession on account of the 100 l., which would have become payable on 11th July 1797, it not being then due, and because it appeared to him that the defendant was entitled to the goods under the stat. 21 Jac. 1. c. 19., therefore he awarded in favour of the defendant.

A rule

A rule having been obtained calling on the defendant to shew cause why the award should not be set aside, as being illegal on the face of it;

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against
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Mingay now shewed cause, and relied on *Lingham v. Biggs* (a); where the furniture of a coffee-house having been taken in execution by a creditor, and by him let (without having been removed) to the keeper of the coffee-house, who afterwards while in possession of the goods became a bankrupt, the property was holden liable to be seized by the assignees, under the 21 Jac. I. c. 19. §. 11. It makes no difference that the trustees took possession of these goods just previous to the act of bankruptcy committed by *Priest*, because that was a palpable fraud, and so considered by the arbitrator. In effect the original agreement between the trustees and the husband amounted to a sale of the goods to him, and they had no right to repossess themselves of them at all, especially after payments had been made by him in part.

Erskine, Gibbs, and Jervis, in support of the rule. All the cases on this subject, from that *Ex parte Marsh* (b) to *Jarman v. Woolloton* (c), recognize the distinction that where the bankrupt is in possession of the goods at the time of his bankruptcy in right of another, with whose title his possession is consistent, the assignees are not entitled to the property within the meaning of the statute. In the first of those cases a widow by marriage articles previous to her second marriage conveyed to trustees for her separate use, and subject to her appointment, 600 l., of which her intended husband had possessed himself, and for which he had given his bond, and also certain plate, for the use of her children by the first marriage: she appointed the money for the use of the same children, and died, leaving her husband in possession of the plate, who afterwards became a bankrupt: the children applied to be admitted creditors for the 600 l., and to have the plate delivered to them; both of which were directed by Lord *Hardwicke*, who said that the wife had the plate in *auter droit* as administratrix to her first husband, and the second husband could not have them in a better right; and therefore it was not a case within the statute. In *Jarman v. Woolloton* a woman before marriage conveyed her stock in trade and furniture to trustees to enable her to carry on her business separately: there the Court held that if in fact the trade were

(a) 1 *Pul. and Bos.* 82.(b) 1 *Atk.* 158.(c) *Ante*, 3 vol. 618.

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against
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so carried on, the stock would not be liable to the husband's debts within the 21 Jac. 1., but that even if the trade were carried on jointly, and so the stock liable to be taken as his, yet *the furniture* would not be so, though it were removed to the husband's house upon the marriage, and he had the use of it in common with his wife. The latter part of that case cannot be distinguished on principle from the present. It is not stated in this award that there was an actual sale of the goods by the trustees to the husband: but considering them as the property of the wife and children, he has drawn a wrong conclusion in point of law from the fact of the husband's possession. It appears from the facts stated that the goods were only to become his property upon a condition which has failed, namely, that of his making the annual payments of 100 l. until the whole was liquidated; he had no right to dispose of them in the mean time. At all events the trustees had a lien upon the goods to the extent of the arrears due and payable; or if not for those due, yet for the payment of the last instalment, which did not accrue until after the bankruptcy, and with respect to which no laches can be imputed to them. But whatever doubt there might have been in the case if the bankrupt had continued in possession of the goods to the time of his bankruptcy, yet as the trustees had before possessed themselves of them (as they lawfully might) for the arrears, the operation of the 21 Jac. 1. never attached upon the property at all; for that statute only transfers to the assignees the property of such goods as the bankrupt has in his possession, order, and disposition, by the consent of the true owner *at the time of the bankruptcy*.

Lord KENYON Ch. J. I think the arbitrator has determined this case according to conscience and law. The plaintiffs were invested with a trust in certain goods for the benefit of children, and in breach of that trust suffered the bankrupt to remain in possession of them without making those payments which he had engaged to do on behalf of the persons entitled from the year 1791 down to the present time. All this while he remained in possession of them, not in *auter droit*, as was said by Lord *Hardwicke* in the case *Ex parte Marsh (a)*, but in his own right, having before contracted for the purchase of the goods at a certain price payable by instalments. Then just upon the eve of his bankruptcy the trustees re-

(a) 1 Atk. 158.

possessed themselves of the goods; by what authority I know not; for it cannot be denied that the bankrupt had acquired some right in them by the part-payments which he had made. This was a gross fraud, and cannot take the case out of the statute of the 21 Jac. I think that the arbitrator has done perfectly right in drawing the conclusion which he has drawn, that the trustees suffered the bankrupt "to have the possession, order, and disposition," of the goods down to the time of his bankruptcy; and therefore the case falls within the very words as well as the meaning of the statute; and the assignee is entitled to the possession of the goods.

Per Curiam.

Rule discharged.

PRENDERGAST *against* DAVIS and KING.

Wednesday,
Nov. 28th.

ERSKINE and Best obtained a rule calling on the plaintiff to shew cause why the bail-bond given by the defendants should not be delivered up to be cancelled.

The defendants had become bail to the sheriff in another action brought by the present plaintiff against a third person, and the plaintiff, having taken an assignment of the bail-bond, put it in suit and obtained judgment thereon. The present action was brought upon that judgment for the original debt and costs, and the defendants were arrested on a bailable writ for the amount.

This (they contended) was without authority; for in *Brander v. Robson* (a) it was resolved that bail to the sheriff in another action could not themselves be holden to bail in an action on the bail-bond, because that would lead to bail in infinitum; so on the same principle they ought not to be holden to bail in an action upon the judgment for the same cause of action. It is a general rule (b) that a defendant cannot be arrested in an action on a judgment unless he might have been arrested in the original action.

Garrow on shewing cause observed that this was in part for a new cause of action, namely, the costs of the former suit.

Lord KENYON Ch. J. This seems distinguishable from the common rule, that bail shall not be holden to bail; because there it is for the same cause of action: but after judgment recovered against the bail, there does not appear to be any reason why in an action

Bail in the original action, after judgment recovered against them on the bail-bond, may be holden to bail in an action on such judgment.

(a) *Ante*, 6 vol. 336.

(b) *Tidd's Practice* 39.

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CAST
against
DAVIS and
KING.

on such judgment, which includes a new cause of action, namely, the costs, the defendants should not be holden to bail. The plaintiff might have taken them on a *capias ad satisfaciendum* under the former judgment.

Per Curiam

Rule discharged.

Wednesday,
Nov. 28th.

M^c ILEHAM against SMITH.

A rule nisi
for an attach-
ment for
non-payment
of money,
pursuant to
the Master's
allocatur,
cannot be
served on a
Sunday.

THIS was an application for an attachment against the defendant for non-payment of the balance of an attorney's bill pursuant to the Master's allocatur under the usual reference by a judge's order.

Garrow, who now shewed cause against the rule, objected to the service of it because it was made on a *Sunday*.

Lawes contended that the service was sufficient; 1st, Upon the ground of necessity; the affidavit of service stating that repeated endeavours, both before and after the service, had been used to serve the party without effect; and that he kept out of the way on purpose to avoid the service. 2dly, That the rule nisi was a proceeding of a *criminal* nature, and might therefore be served on a *Sunday*; 12 *Mod.* 348 and 2 *Ld. Raym.* 1028. He also contended, that this not being the case of an actual *arrest*, or of the *service* of any *writ* or *process*, was not within the Statute 29 *Car. 2. c. 7. s. 6.*, that statute making the writ *void*, and subjecting the party executing it to an action at the suit of the party grieved, as if he had acted without any writ &c. *Wilson v. Tucker, Salk.* 78.: whereas in the present case, the rule nisi would still be an existing and a valid rule, and no action could be maintained for the mere service of it. But

Lord KENYON Ch. J. after adverting to the statute and expressing an anxious wish to preserve as much as possible a strict attention to the *Sabbath*, said that the Statute of *Car. 2.* was equally applicable to the case of a service (a) of process as to an actual arrest; and that the rule in the present case was a proceeding within the act.

The rest of the Judges concurring,

Rule discharged.

(a) By the Stat. 29 *Car. 2. c. 7. s. 6.* it is enacted that "no person upon the Lord's day shall serve or execute any writ, process, warrant, order, judgment, or decree, except in cases of treason felony or breach of the peace" &c.

1798.

BARTON *against* MOORE one &c.Wednesday,
Nov. 28th.

THE plaintiff filed a bill in last *Easter* term against the defendant, to which the general issue was pleaded; and in this term, having obtained leave to amend it, he delivered the amended declaration on *Thursday* the 22d instant; a rule to plead was given on the same day; and on *Monday* the 26th the plaintiff signed judgment as for want of a plea.

The rule to plead to an amended declaration must be a four days' rule.

A rule having been obtained, calling on the plaintiff to shew cause why the judgment should not be set aside for irregularity, one question was whether a rule to plead to an amended declaration were a two or a four days' rule; if the former, the time for pleading expired on *Saturday* the 24th of *November*, and then the judgment was regular; if the latter, as the four days did not expire until the *Monday*, the judgment, which was signed on that day, was signed too soon.

The Court (after consulting the Master) said that the rule for pleading to an amended declaration was a four days' rule; and therefore that this judgment was irregularly signed on the *Monday*, before the expiration of the fourth day. And on this ground the

Rule was made absolute.

Best in support of the rule.

Onslow against it.

JENKINS *against* LAW.

THE parties having entered into arbitration-bonds, with the usual agreement that the submission should be made a rule of Court, it was accordingly made a rule of Court. Afterwards the parties by an indorsement on the bond, and signed by both of them, agreed that the time of making the award, which had been originally fixed for the 31st of *May*, should be enlarged: but it was not added as a part of this agreement that *this* should be made a rule of Court. The arbitrator made his award within the enlarged time but not until after the 31st of *May*.

An agreement to enlarge the time for making an award must contain a consent that it shall be made a rule of Court, otherwise no attachment will be granted for not performing an award made under it.

A rule

1798.

JENKINS
against
LAW.

A rule having been obtained, calling on the defendant to shew cause why an attachment should not issue against him for not performing the award,

Garrow, who now shewed cause, objected that, there being no agreement to make the consent for enlarging the time for making the award a rule of Court, no attachment could issue as for a contempt of the Court.

Bayley, in support of the rule, admitting that this objection was fatal,

The Court discharged the rule.

END OF MICHAELMAS TERM

C A S E S

1799.

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the Thirty-ninth Year of the Reign of GEORGE III.

D. BLACHFORD and another, Executors of G. BLACHFORD, *against* PRESTON.

Thursday,
Jan. 24th.

THIS was an action of assumpsit, on an agreement entered into between the testator and the defendant on the 1st of *July* 1786, in which in consideration that the testator had paid to the defendant 5000*l.* for the command of a ship called the *Foulis* in the *East India* Company's service the defendant promised to pay to the testator in his lifetime or to his executors after his decease the sum of 5000*l.* "upon the appointment of another person to succeed him (the testator) in the command of the said ship or of any other ship that should be thereafter built on the same bottom in lieu and stead of the testator." The declaration, after setting forth the agreement, stated that the testator died on the 8th of *March* 1792, and that afterwards, on the 8th of *July* 1795, another ship was built on the bottom of the *Foulis* called the *Cirencester*, to which *M. Lindsay* was appointed as the commander in lieu and stead of the testator, but that the defendant on such appointment refused to pay the sum of 5000*l.* to the plaintiffs, the executors.

A sale (by the owner) of the command of a ship employed in the *East India* Company's service, without the knowledge of the Company, is illegal; and the contract of sale cannot be the foundation of an action.

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The second count stated the agreement thus; that the defendant promised that the testator in his lifetime or his executors after his death should receive 5000 *l.* from the person appointed to succeed him in the command of the *Foulis* or of any other ship that should thereafter be built on the same bottom in lieu of the testator. The third count alleged that the agreement was, "that the defendant should pay such sum and sums of money and securities for money not exceeding 5000 *l.* as he (the defendant) should receive from the person appointed to succeed the testator in the command of the *Foulis* or any other ship," &c. &c; averring that *M. Lindsay* was appointed &c, from whom the defendant received 2500 *l.* in money and a bond for the payment of another sum of 2500 *l.*, which he (the defendant) had refused to pay and deliver to the plaintiffs &c.

At the trial before Lord *Kenyon* at the Sittings in *London* the case appeared to be this. In the year 1783 the testator was appointed to the command of the *Foulis East Indiaman* on the recommendation of the defendant, the husband or managing owner, for which he paid the defendant 5000 *l.* On his appointment he and the defendant entered into a charter-party with the *East India Company*, in which it was agreed that "neither he or the defendant should sell or permit or suffer any other person to sell to the master or any other officer of the ship his or their place or office, or take any promise or reward for or in respect of any place or office in or belonging to the ship &c." In 1791 the *Foulis* was lost at sea with the captain on board in her passage from *Madras* to *Bencoolen*. In 1794 the defendant obtained leave from the *East India Company* to build another ship, (the *Cirencester*,) in lieu and on the bottom of the *Foulis*, and appointed Captain *Lindsay* to the command in consideration of 2500 *l.* paid in money and of a bond for 2500 *l.* more, which he (the defendant) afterwards paid to the widow and children of Captain *Blackford*, not to the plaintiffs his executors. For a long time prior to the testator's appointment to the *Foulis* it had become usual for the captains of *East India* ships to purchase their commands, though it was contrary to the by-laws of the Company. In *February* 1796 the Court of Directors came to a resolution, which was afterwards confirmed by the proprietors, to abolish the practice "long known to have been privately carried on and at last publicly avowed, of the sale of commands," and to make a pecuniary compensation to those who had paid for their commands. And in consequence of this the Com-
 pany

pany afterwards allowed Captain *Lindsay* 4833 *l.*, as a compensation for what he had paid to the defendant. Under the above resolution the Company also made allowances to the executors of some late commanders. There was no written contract between the testator and the defendant, but it seemed admitted that the former had paid the latter 5000 *l.* under a promise that it should be returned when his successor was appointed. A verdict was taken for the plaintiffs, damages 4833 *l.*, with liberty to the defendant to move to enter a nonsuit if this Court should be of opinion that the plaintiffs were not entitled to recover.

Such a rule was accordingly obtained in last *Easter* term, on the ground that the contract on which the action was founded was illegal, because it was not only contrary to the bye-laws of the *East India* Company, and to the charter-party which had been executed both by the testator and the defendant, but was also inconsistent with public policy. The case was shortly spoken to in last *Trinity* term, but its further discussion was then postponed under an expectation that a compromise would take place. That failing,

Erskine, *Gibbs*, and *Skinner*, now shewed cause against that rule. 1st, It is too much for the defendant to contend that this contract is void as having been entered into contrary to the bye-laws of the *East India* Company, because the agreement was founded on a practice that had universally obtained for a long period, and that prevailed even with the knowledge of the *East India* Company, who so lately as the year 1796 (subsequent to the time when this transaction took place) came to certain resolutions on the subject with a view of making a pecuniary satisfaction to those captains who had purchased their commands on the strength of the usage. 2^{dly}, Still less ground is there for saying that this contract is void because contrary to the stipulations of the charter-party, for the contract was entered into before the charter-party was in existence. 3^{dly}, Nor can it be said that the agreement is illegal and void as being against the principles of sound policy. For though it may be admitted that there are other offices, besides those that are enumerated in the stat. 5 & 6 *Ed. 6. c. 16.*, that cannot legally be sold, they must be offices respecting which the public are concerned. But the employment in question does not concern the public, but is a mere private appointment by a great commercial company. But even if this contract were illegal on either of the above grounds, still it must be observed that the plaintiffs do not

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come to enforce the illegal contract: that agreement has been executed, and this action is brought against the defendant to recover the money that he has received. It is admitted that he received this money not for himself, but as a trustee under his contract with the testator, and having so received it after the testator's death, he must be taken to have received it for the legal representatives of Captain *Blackford*.

Lord KENYON Ch. J. (stopping the counsel on the other side). There is no rule better established respecting the disposition of every office in which the public are concerned than this, *detur digniori*; on principles of public policy no money consideration ought to influence the appointment to such offices. This principle was much considered by the late Lord Chancellor *Thurlow*, in a case that came before him on an injunction bill, where a noble Lord having, in consequence of his own office in the King's household, recommended another person to the appointment of another place in the household, and having made that recommendation in consideration of an annuity to be granted to a third person, not to himself, the contract was considered as illegal; and a perpetual injunction was granted to the party suing on that contract in a court of law (a). Up to a certain extent the Legislature have interfered and prohibited, by the stat. 5 & 6 Ed. 6., the sale of some offices; but whether or not that act of parliament were necessary for the purpose I will not now inquire. If the contract, which is the foundation of this action, were legal, and the question were whether the executors or the widow of the late Captain *Blackford* were entitled to the money in dispute, the right of the former must have prevailed. But a plaintiff, who comes into a court of justice to enforce a contract, must come on legal grounds; and if he have not a legal title, he cannot succeed whatever the private wishes of the Court may be. In this case the plaintiffs have relied on the practice that (as it is said) had so long prevailed of selling the commands of ships: but that practice is in violation of the laws and regulations of the *East India* Company. And it appeared in this case that in the year 1783 a charter-party was entered into, to which the plaintiffs' testator, the defendant, and the *East India* Company, were parties, and by the express stipulations of that contract it was agreed that no place or office in the ship should be sold. I may again resort to that with which I set out, that

(a) See *Hansington v. Du Chattel*, 1 Bro. Ch. Cas. 124.

public policy requires that there should be no money consideration for the appointment to an office in which the public are interested; the public will be better served by having persons best qualified to fill offices appointed to them; but if money may be given to those who appoint, it may be a temptation to them to appoint improper persons. The *East India* Company is a limb of the government of the country; and on the ground that this contract was a fraud on the *E. I.* Company, from which much mischief to the public may ensue, I am of opinion that it cannot be made the basis of an action.

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ASHHURST J. It is a clear rule of law that no right of action can spring out of an illegal contract. This contract is illegal, as being against the principles of public policy, and therefore I agree with my Lord that the plaintiffs cannot recover upon it.

GROSE J. This is an attempt by the executors of Captain *Blachford* to recover a sum of money which (they say) is due to them under a contract entered into by him in violation of another contract that he and the defendant made with the *East India* Company. Now it has been holden that where puffers have been employed at an auction, it is a fraud upon the buyers, and no sale at such an auction can be enforced in a court of justice. So this contract is a fraud on the *E. I.* Company; it was entered into in defiance of the salutary regulations which were made by a great commercial company for the benefit of the public. It was also decided a few years ago in the Common Pleas (a) that no action could be maintained on an illegal contract respecting the appointment to an office which is not saleable. And it seems to me that the principle, on which that case was determined, also applies to and must govern the present case. Therefore I am of opinion that the plaintiffs cannot recover on this agreement.

LAWRENCE J. The case is shortly this; the late Captain *Blachford* paid the defendant 5000*l.* to procure him the appointment to the command of a ship in the *East India* Company's service, in consideration of which the defendant promised to repay him or his representatives the same sum when any other person should be appointed to the command of that ship or of any other ship built upon her bottom; and the title of the present plaintiffs is founded on that contract. After this agreement was entered into the ship was lost with Captain *Blachford* on board her, and Captain *Lindsey* was ap-

(a) Vid. *Garforth v. Fearon*, 1 H. Bl. Rep. 327.

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pointed to the ship which was built upon her bottom, for which appointment *Lindsey* paid the defendant a large sum of money; subsequent to this the *East India* Company came to a resolution for the purpose of abolishing the practice of selling the commands of ships and of making compensation to some of the officers in their service who had paid for their commands; they allowed Captain *Lindsey* among the rest a certain sum of money, but no compensation was made to the representatives of *Blachford*: but this resolution was not made in approbation of the practice that had prevailed before; but, feeling that they were blamable for not having put a stop to it sooner, they came to the resolution of abolishing the practice that had obtained in defiance of the bye-laws of the Company. Then this action is founded on the contract of the defendant to repay to *Blachford* or his representatives the sum of 5000*l.* on the appointment of a successor to *Blachford*, and not on the receipt of money by the defendant from Captain *Lindsey*; for the plaintiffs' right of action against the defendant would have been equally good though he had received nothing from *Lindsey*. It is not a contract to pay such money as the defendant should receive from any other captain, but to repay a certain sum at all events on the appointment of another; and therefore the argument at the bar that this action is bottomed on a contract that has been executed is not well-founded. Then the short question here is whether or not a contract entered into between two individuals in direct violation of the orders of the *E. I.* Company and against public policy can be enforced in a court of justice. With regard to offices under government, it has been decided that they cannot be sold, though they be not such offices as are mentioned in the statute 5 & 6 *Edw.* 6. This point was much considered in *Parsons v. Thompson* (a), where an officer in the Dockyard at *Chatham* agreed to give another officer there a certain share of the profits if the latter would procure himself to be superannuated and retire on the usual pension to make way for the former; and it was holden that such agreement, having been made without the knowledge of the Navy Board to whom the appointment belonged, could not be the foundation of an action, because it was contrary to public policy. There a distinction was taken between those offices that cannot be legally sold and those that may be the object of sale, where the sale takes place under the authority and with the consent of those who have the power of

(a) 1 *H. Bl. Rep.* 322.

appointment, as commissions in the army. Now the principle on which that case and the cases there referred to was decided must govern the present, unless it can be shewn that there is some distinction between offices held under the *E. I. Company* and those under Government: but I think no such distinction can be established as far as respects this purpose. But independently of that ground, a plaintiff cannot recover in a court of justice whose cause of action arises out of a contract made between him and the defendant in fraud, or to the prejudice, of third persons. Such is the case, alluded to by my Brother *Grose*, of puffers at an auction; it is a fraud upon the buyers. So here this contract is a fraud on the *E. I. Company*, and cannot be the foundation of an action. On this ground therefore as well as because it is contrary to principles of public policy to allow of such contracts as the present, I am of opinion that the plaintiffs cannot maintain this action.

Rule absolute.

HORNBLOWER and MABERLY *against* BOULTON and
WATT; in Error.

Friday,
Jan. 25th.

THIS was an action on the case brought in the Court of Common Pleas by the defendants in error against the plaintiffs in error for infringing a patent.

The declaration stated letters patent granted by the King, dated 5th *January* 9 *Geo. 3.*, in which, after reciting that *Watt* one of the plaintiffs below had "invented a method of lessening the consumption of steam and fuel in fire engines," was granted to *Watt* his executors administrators and assigns the sole privilege of "making using exercising and vending his said invention" for fourteen years, and by which all other persons were prohibited "using or putting in practice the said invention, or counterfeiting imitating or resembling the same, or making any addition to or subtraction from it, without the license of *Watt*;" on condition that *Watt* should enrol a specification of his invention in Chancery within four months. It then stated that on the 29th of *April* in

A patent was granted by the crown for fourteen years to *A.* for his "method of lessening the consumption of steam and fuel in fire engines;" the specification stated that the "method consisted of the following principles," (describing the mode in which those principles were applied to the purposes of the invention;)

afterwards an act of parliament was passed to extend the patentee's term, the title of which was an act for vesting the sole property &c "of certain steam engines called fire engines, of his invention" &c; and after reciting that the patent was "for making and vending certain engines by him invented for lessening the consumption of steam and fuel in fire engines" &c, it granted him the sole right of "making and selling the said engines."—Held that the invention was the subject of a patent, and (the patentee having in his specification described his invention) that the patentee's right under the patent and act of parliament was valid.

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pointed to the ship which was built upon her bottom, for which appointment *Lindsey* paid the defendant a large sum of money; subsequent to this the *East India* Company came to a resolution for the purpose of abolishing the practice of selling the commands of ships and of making compensation to some of the officers in their service who had paid for their commands; they allowed Captain *Lindsey* among the rest a certain sum of money, but no compensation was made to the representatives of *Blackford*: but this resolution was not made in approbation of the practice that had prevailed before; but, feeling that they were blamable for not having put a stop to it sooner, they came to the resolution of abolishing the practice that had obtained in defiance of the bye-laws of the Company. Then this action is founded on the contract of the defendant to repay to *Blackford* or his representatives the sum of 5000*l.* on the appointment of a successor to *Blackford*, and not on the receipt of money by the defendant from Captain *Lindsey*; for the plaintiffs' right of action against the defendant would have been equally good though he had received nothing from *Lindsey*. It is not a contract to pay such money as the defendant should receive from any other captain, but to repay a certain sum at all events on the appointment of another; and therefore the argument at the bar that this action is bottomed on a contract that has been executed is not well-founded. Then the short question here is whether or not a contract entered into between two individuals in direct violation of the orders of the *E. I.* Company and against public policy can be enforced in a court of justice. With regard to offices under government, it has been decided that they cannot be sold, though they be not such offices as are mentioned in the statute 5 & 6 *Edw.* 6. This point was much considered in *Parsons v. Thompson* (a), where an officer in the Dockyard at *Chatham* agreed to give another officer there a certain share of the profits if the latter would procure himself to be superannuated and retire on the usual pension to make way for the former; and it was holden that such agreement, having been made without the knowledge of the Navy Board to whom the appointment belonged, could not be the foundation of an action, because it was contrary to public policy. There a distinction was taken between those offices that cannot be legally sold and those that may be the object of sale, where the sale takes place under the authority and with the consent of those who have the power of

(a) 1 *H. Bl. Rep.* 322.

appointment, as commissions in the army. Now the principle on which that case and the cases there referred to was decided must govern the present, unless it can be shewn that there is some distinction between offices held under the *E. I. Company* and those under Government: but I think no such distinction can be established as far as respects this purpose. But independently of that ground, a plaintiff cannot recover in a court of justice whose cause of action arises out of a contract made between him and the defendant in fraud, or to the prejudice, of third persons. Such is the case, alluded to by my Brother *Grose*, of puffers at an auction; it is a fraud upon the buyers. So here this contract is a fraud on the *E. I. Company*, and cannot be the foundation of an action. On this ground therefore as well as because it is contrary to principles of public policy to allow of such contracts as the present, I am of opinion that the plaintiffs cannot maintain this action.

Rule absolute.

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HORNBLOWER and MABERLY *against* BOULTON and
WATT; in Error.

Friday,
Jan. 25th.

THIS was an action on the case brought in the Court of Common Pleas by the defendants in error against the plaintiffs in error for infringing a patent.

The declaration stated letters patent granted by the King, dated 5th January 9 Geo. 3., in which, after reciting that *Watt* one of the plaintiffs below had "invented a method of lessening the consumption of steam and fuel in fire engines," was granted to *Watt* his executors administrators and assigns the sole privilege of "making using exercising and vending his said invention" for fourteen years, and by which all other persons were prohibited "using or putting in practice the said invention, or counterfeiting imitating or resembling the same, or making any addition to or subtraction from it, without the license of *Watt*;" on condition that *Watt* should enrol a specification of his invention in Chancery within four months. It then stated that on the 29th of April in

A patent was granted by the crown for fourteen years to *A.* for his "method of lessening the consumption of steam and fuel in fire engines;" the specification stated that the "method consisted of the following principles," (describing the mode in which those principles were applied to the purposes of the invention;)

afterwards an act of parliament was passed to extend the patentee's term, the title of which was an act for vesting the sole property &c "of certain steam engines called fire engines, of his invention" &c; and after reciting that the patent was "for making and vending certain engines by him invented for lessening the consumption of steam and fuel in fire engines" &c, it granted him the sole right of "making and selling the said engines."—Held that the invention was the subject of a patent, and (the patentee having in his specification described his invention) that the patentee's right under the patent and act of parliament was valid.

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the same year he did inrol a specification (a) in Chancery; averring that such specification "particularly described and ascertained the nature of the said invention, and in what manner the same was to be performed" &c. The declaration then set forth an act of parliament, (b) 15 Geo. 3., extending the privilege given by the patent

(a) The specification was as follows; "My method of lessening the consumption of steam and consequently fuel in fire engines consists of the following principles.

First, That vessel in which the powers of steam are to be employed to work the engine, which is called the cylinder in common fire engines, and which I call the steam vessel, must, during the whole time the engine is at work, be kept as hot as the steam that enters it; first, by inclosing it in a case of wood or any other materials that transmit heat slowly; secondly, by surrounding it with steam or other heated bodies; and thirdly, by suffering neither water or any other substance colder than steam to enter or touch it during that time.

Secondly, In engines that are to be worked wholly or partially by condensation of steam, the steam is to be condensed in vessels distinct from the steam vessels or cylinders, although occasionally communicating with them; these vessels I call condensers; and whilst the engines are working, these condensers ought at least to be kept as cold as the air in the neighbourhood of the engines by application of water or other cold bodies.

Thirdly, Whatever air or other elastic vapour is not condensed by the cold of the condenser, and may impede the working of the engine, is to be drawn out of the steam vessels or condensers by means of pumps wrought by the engines themselves, or otherwise.

Fourthly, I intend in many cases to employ the expansive force of steam to press on the pistons, or whatever may be used instead of them, in the same manner as the pressure of the atmosphere is now employed in common fire engines. In cases where cold water cannot be had in plenty, the engines may be wrought by this force of steam, only by discharging the steam into the open air after it has done its office.

Fifthly, Where motions round an axis are required, I make the steam vessels in form of hollow rings or circular channels, with proper inlets and outlets for the steam, mounted on horizontal axes like the wheels of a water mill; within them are placed a number of valves that suffer any body to go round the channel in one direction only; in these steam vessels are placed weights so fitted to them as entirely to fill up a part or portion of their channels, yet rendered capable of moving freely in them by the means hereinafter mentioned or specified. When the steam is admitted in these engines between these weights and the valves, it acts equally on both, so as to raise the weight to one side of the wheel, and by the reaction on the valves successively to give a circular motion to the wheel; the valves opening in the direction in which the weights are pressed, but not in the contrary, as the steam vessel moves round it is supplied with steam from the boiler, and that which has performed its office may either be discharged by means of condensers, or into the open air.

Sixthly, I intend in some cases to apply a degree of cold not capable of reducing the steam to water, but of contracting it considerably, so that the engines shall be worked by the alternate expansion and contraction of the steam.

Lastly, Instead of using water to render the piston or other parts of the engines air and steam tight, I employ oils, wax, resinous bodies, fat of animals, quicksilver, and other metals in their fluid state."

To the above specification this memorandum was added by *Watt*; that he did not intend that any thing in the fourth article should be understood to extend to any engine where the water to be raised enters the steam vessel itself, or any vessel having an open communication with it.

(b) The act was entitled "an act for vesting in *J. Watt* his executors &c the sole use and property of steam engines, commonly called fire engines, of his invention, described in the said act, for a limited time."

patent to 25 years, with a proviso "that every objection in law competent against the said patent should be competent against the said act to all intents and purposes, except so far as related to the term thereby granted." It then stated that on the 5th of *September* 1777 *Watt* by deed assigned over to *Boulton* (the other plaintiff below) two-thirds of his interest under the patent and act of parliament, and then it alleged that the defendants below unlawfully and unjustly and without the license of the plaintiffs constructed divers, to wit, ten fire engines according to and in and with a method of lessening the consumption of steam and fuel in such fire engines in imitation and resemblance of the method of lessening the consumption of steam and fuel in fire engines so invented by *Watt* and secured to him and his assigns &c.

The defendants below pleaded not guilty; and a general verdict having been found for the plaintiffs below, and judgment given for them by the Court of Common Pleas (a), the defendants

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It recited that the King had by letters patent, 5 *Jan.* 9 *Geo.* 3, granted to *Watt* his executors &c "the sole benefit and advantage of making and vending certain engines by him invented for lessening the consumption of steam and fuel in fire engines for 14 years" &c, on condition that he should enrol a specification &c; that *Watt* had accordingly enrolled a specification of the said engine (which specification was there set forth as above). It further recited that *Watt* had employed many years and a considerable part of his fortune, in making experiments upon steam and steam engines, commonly called fire engines, with a view to improve them, by which several considerable advantages over the common steam engines are acquired, but on account of the many difficulties which arise in the execution of such large and complex machines, and of the long time requisite to make the necessary trials, he could not complete his intention before the end of the year 1774, when he finished some large engines as specimens of his construction, which had succeeded so as to demonstrate the utility of the invention; and in order to manufacture these engines with accuracy, and so that they might be sold at moderate prices, a considerable sum of money must be previously expended in erecting mills and other apparatus, and that several years, and repeated proofs would be required before any

considerable part of the public could be fully convinced of the utility of the invention, and of their interest to adopt the same, the whole term granted by the letters patent might probably elapse before *Watt* could receive an advantage adequate to his labour and invention; and then it enacted that from and after the passing of the act the sole privilege and advantage of making constructing and selling the said engines hereinbefore particularly described, within the kingdom of *Great Britain*, and his Majesty's colonies and plantations abroad, should be and were thereby declared to be, vested in *Watt* his executors, administrators, and assigns for and during the term of 25 years; and it prohibited any other persons making using or putting in practice the said invention, or counterfeiting or imitating the same, or making any addition to or subtraction from it without *Watt*'s license &c; with a proviso that the act should not extend to prevent any person making any fire or steam engine, or any contrivance relating to the same, which was not the invention of *Watt*, or which had been publicly used by any other person before.

(a) This case was not argued in the Common Pleas, that Court having been equally divided in a former case arising on this patent; See *Boulton and Watt v. Bull*, 2 *H. Bl. Rep.* 463.

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brought a writ of error, and, besides the general error, assigned for error that the invention for which the letters patent were granted is not an invention of any formed or organized machine instrument or manufacture but of mere principles only, for which no such letters patent could by law be granted.

This case was twice argued with great ability, the first time in *Michaelmas* term last by *Gaselee* for the plaintiffs in error and *Holroyd* for the defendants, and now by *Le Blanc* King's Serjt. for the former and *Rous* for the latter. On behalf of the plaintiffs in error it was argued, 1st, that unless the patent could be established as for a formed machine, it could not be supported under the proviso of the stat. 21 *Jac.* 1. c. 3., which is the only foundation of such a patent; 2dly, that upon reading the patent in question, it could not be considered as a patent for such a machine; 3dly, that the specification did not contain a sufficient description of a machine; and 4thly, that the patent was taken for the whole, when it ought to have been for an addition only; the addition alone appearing in the specification to be of the plaintiff's invention.

But the Court gave judgment in favour of the defendants in error.

Lord KENYON Ch. J. It was rather from a deference to the very respectable opinions given in the Court of Common Pleas on the former occasion than from any doubt we entertained on the subject that a second argument was awarded here: but the case having been most ably argued, and every argument advanced at the bar that bears upon it, I wish to deliver my opinion now, to prevent any farther delay to the parties interested. I confess I am not one of those who greatly favour patents; for though in many instances, and particularly in this, the public are benefited by them, yet on striking the balance upon this subject, I think that great oppression is practised on inferior mechanics by those who are more opulent. The principal objection made to this patent by the plaintiffs in error is, that it is a patent for a philosophical principle only, neither organized or capable of being organized; and if the objection were well founded in fact, it would be decisive: but I do not think that it is so. No technical words are necessary to explain the subject of a patent; as Lord *Hardwicke* said upon another occasion, there is no magic in words. The questions here are whether by looking at the patent, explained as it is by the specification,

fication, it does not appear to be a patent for a manufacture, and whether the specification is not sufficient to enable a mechanic to make the thing described? The jury have not indeed answered those questions in the affirmative in terms: but they have impliedly done so by finding a general verdict for the plaintiffs below. By comparing the patent and the manufacture together it evidently appears that the patentee claims a monopoly for an engine or machine, composed of material parts, which are to produce the effect described, and that the mode of producing this is so described as to enable mechanics to produce it. Having said thus much, it appears that the subject, as far as we have to treat of it, is exhausted. I have great respect for the contrary opinions that were given in the Common Pleas; and probably if I had been called upon on a sudden to determine this case, I should have been at a loss how to decide. But having now heard every thing that can be said on the subject, I have no doubt in saying that this is a patent for a manufacture, which I understand to be something made by the hands of man.

ASHHURST J. Every new invention is of importance to the wealth and convenience of the public; and when they are enjoying the fruits of an useful discovery, it would be hard on the inventor to deprive him of his reward. In this case the jury have found, by their verdict, that all the allegations in the declaration were proved, one of which was that the inventor had by his specification particularly described the nature of his invention and the manner in which it was to be performed; and having thus complied with the terms of his patent, I think he is in point of law as well as justice entitled to the benefit which the patent and the act of parliament intended to confer on him.

GROSE J. This is an action for violating that right supposed to have been given originally for 14 years by the patent in 1769, and contended to be continued to *James Watt* his representatives and assigns for 25 years by the statute in 1774. The statute recites the patent, the benefit of which is now determined by flux of time; and therefore the action can only be sustained on the continuance of that benefit to the patentee by the Legislature. The statute however expressly provides that every objection in law competent against the patent shall also be competent against the statute, that is, against the benefit to be derived to the patentee under the statute. The question then is, whether the patent be

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good in law, in other words, whether it be conformable to the statute of the 21 Jac. 1. c. 3. s. 6. under which the plaintiff or any party can alone claim the privilege of a monopoly. The power thereby reserved to the King is "that any declaration before-mentioned shall not extend to any letters patents and grants of privilege for the term of 14 years or under thereafter to be made of the sole *working* or *making* of any manner of *new manufactures* within this realm to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patents and grants shall not use; so as also they be not *contrary to the law*, nor *mischievous to the State*, by raising prices of commodities at home, or *hurt of trade*, or *generally inconvenient*." The questions then upon this patent are whether it be a patent for the sole working or making of any manner of new manufacture; whether the patentee were the first inventor; whether it be contrary to law, mischievous to the State or to trade, or generally inconvenient? By a proviso in the patent the patentee is bound particularly to describe and ascertain the nature of his invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal, and to cause the same to be inrolled in the Court of Chancery. On which another question arises, namely, whether the specification inrolled be sufficient. The aim of the Legislature is obvious; on the one hand it was to encourage ingenious artificers and able and studious men to invent and bring forward for the use of the public new manufactures, the produce of their own ingenuity, by holding out to them the reward of 14 years monopoly: on the other hand to secure to the public the benefit of the discovery by causing to be inrolled a complete description of the thing to be done and the manner of doing it, that others might be fully informed of it, and at the end of the 14 years to be enabled to work or make the manufacture of which the patentee was the inventor. Upon some of the questions there seems to be no doubt: there is no doubt on this record, coupled with the finding of the jury, that the patentee was the inventor of that which is stated in the declaration to be (by whatever name it may be called) an invention, method, principle, or manufacture. Neither is it contended that the subject of the patent is "mischievous to the State, hurtful to trade, or generally inconvenient." On the contrary every man's experience, as far as report goes, tells him that the invention has infinite merit, is for very many purposes highly beneficial to the public, and is in great request.

request. As to the specification, I shall content myself with repeating what was said by one of the learned Judges of the Court of Common Pleas, that if the specification be such as will enable artists to adopt the invention and make the manufacture, it is sufficient. It is averred in the declaration that the patentee did in pursuance of the proviso particularly describe and ascertain the nature of the invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal in the Court of Chancery; that fact was necessary to be proved to entitle the plaintiffs to a verdict, and by the verdict which they obtained, I consider that fact as ascertained and concluded in their favour.

The important question is whether it be a patent "for the making or working of any manner of new manufacture?" It is argued by the plaintiffs in error, first, that it is a patent for a mere *principle* and not for a *new manufacture*, and that nothing can be the object of a patent but a new manufacture. 2dly, That if it be a patent for a manufacture, namely, the steam engine, it is not new, and that the patent should have been for the addition only and not for the whole engine. As to the first of those propositions, that under the statute of *James* there cannot be a patent for a mere principle, which this is contended to be, it is not necessary for me in my way of considering the case to form a decided opinion on that point; for if I can shew that this is a patent for a *new manufacture*, whether a patent for a mere principle be good or not will be immaterial. Upon that point I shall only say, that having very much turned the question in my mind, and weighed and considered again and again the words of the statute specifying what patents the crown may grant, upon which alone I conceive the question must ultimately depend, I am not prepared to say that a patent for a mere principle was intended to be comprehended within those words. It is indeed difficult to conceive that the Legislature, in giving power to the crown to grant patents for the sole *working or making* of any manner of *new manufacture*, intended a power to grant patents for any other purpose than those expressly mentioned. But, as I said before, this is not material for me to determine, inasmuch as it seems to me upon the best consideration that this is not a patent for a mere principle, but for the working and making of a new manufacture within the words and meaning of the statute. I have been led to adopt this opinion by considering the words and description of the invention in the

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patent as referring to and explained by the specification, and the specification itself as part of the patent. The ground on which I have felt myself at liberty so to do is this; the benefit to the public is from the specification disclosing to the world how others may make and use the same manufacture; without the specification the public have not that information; and by the condition of the letters patent, without the specification, the patentee is not entitled to his monopoly: providing therefore by the patent that there must be a specification, and there being necessarily one in consequence of that proviso, I consider the patent and specification so connected together as to make a part of each other, and that to learn what the patent is, I may read the specification and consider it as incorporated in the patent. Now the patent recites that Mr. *Watt* had invented a method of lessening the consumption of steam and fuel in fire engines; it grants to him the sole use and exercise of that invention, upon condition that he would disclose the nature of the invention and in what manner the same was to be performed by an instrument inrolled. He does so, and that instrument describes the principles of the method and the method by which those principles are to be carried into effect. The method is founded on the principle of keeping the steam vessel the whole time the engine is at work as hot as the steam that enters it: this is to be done by the manufacture of a case of wood or some other material that transmits heat slowly, and by surrounding it with steam or other heated bodies, and suffering neither water or any other substance colder than steam to touch it. Secondly, he points out a mode of condensing the steam by vessels to be used distinct from the steam vessels at some times, at others they are to communicate with them, which he calls condensers; and these are new, at least not part of the old engine, and are to be kept as cold as the air in the neighbourhood of the engines. Thirdly, he gives directions as to drawing out the air not condensed by the cold of the condenser. Fourthly, he states how he means to employ steam to press on the piston in given cases. Fifthly, he directs how steam vessels should be formed where rotatory motions or motions round an axis are required, namely, with weights and valves; and directs how in such case the steam vessel shall be supplied with steam, and how that which has done its office shall be discharged. And he also states a method by which the engine may be worked by the alternate expansion and contraction of the steam. This method however, if not effected or accompanied by a manufacture,

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I should hardly consider as within the statute of *James*. But it seems to me that in this specification he does describe a new manufacture, by which his principle is realized, that is, by which his steam vessel is kept as hot as the steam during the time the engine is at work, by which means the consumption of steam and fuel is lessened. Thus he specifies the particular parts requisite to produce the effect intended, and states the manner how they are to be applied. He describes the case of wood in which the steam vessel is to be inclosed, the engines that are to be worked wholly or partially by condensation of steam, the vessels that he denominates condensers, and the steam vessels where rotatory motions are required. Can it then be said that the making and combining of these parts is not some manner of new manufacture? I cannot say that it is not. But if that had been doubtful, the verdict ascertains the fact. But then it is objected that the patent should have been for that manufacture; whereas it is for principles, which the specification describes. To which I answer that the patent is not merely for principles, nor does the specification describe principles only. The patent states the principles on which the inventor proceeds, and shews in his specification the manufacture by means of which those principles are to take effect, which effect is to be the lessening of the consumption of steam and fuel by keeping the steam vessel of one uniform heat with the steam so long as the engine is worked.

Taking it however as a patent for an engine, it is objected that the thing was made before, and that the patent should have been for the addition only and not for the whole engine. But I do not consider it as a patent for the old engine, but only for the addition to or improvement of the old engine; and so the act of parliament considers it. The old engine consumed too much steam and fuel, and it was considered that by a case of wood or of other material that would transmit heat slowly, surrounding it with steam by the use of condensers, and doing that which was not done in the old engine but is in this, the defects in the old engine might be corrected, and the new one by its additions made more useful. Experiments were tried, as appears by the act of parliament, and the purpose for which these additions were made is ultimately found to be completely attained by the methods pointed out in the specification. It possibly occurred to the inventor that if the patent were to be obtained for the whole engine, it might be open to cavil, and therefore he took out his patent not for the engine, but for

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for *his invention of a method of lessening the consumption of steam and fuel in fire engines*. The method is disclosed in the specification, and it is by the addition of what is there disclosed and by managing it in the way described. The patent therefore is only for that additional improvement as described in the specification; and there is no pretence to say that he claims or could claim the sole making of the old engine. But a doubt is entertained whether there can be a patent for an addition to an old manufacture. This doubt rests altogether upon *Bircott's case* 3 *Inst.* 184; and if that were to be considered as law at this day, it would set aside many patents for very ingenious inventions, in cases where the additions to manufactures before existing are much more valuable than the original manufactures themselves. I shall content myself with referring to what Lord Chief Justice *Eyre* said in this cause in the Court of Common Pleas in answer to this passage, and to the case of *Morris v. Branston* cited by my Brother *Buller* upon the same point. If indeed a patent could not be granted for an addition it would be depriving the public of one of the best benefits of the statute of *James*. Lord *Coke's* opinion therefore seems to have been formed without due consideration, and modern experience shews that it is not well founded. The statute 15 *Geo.* 3. (I observe) secures to the patentee the privilege of constructing and selling *the engines* in words; on which account it has been objected that it falsely recites the patent, and therefore cannot operate in support of it: but the statute must have a reasonable construction to support rather than defeat the intention of the Legislature and their grant; and by attending to every part of the statute it is obvious that the engines secured to the patentee are such as are improved in the manner stated in the specification, and not the original fire engines. For the statute, reciting the patent, recites it as a grant of the benefit and advantage of making and vending "certain engines *by him invented for lessening the consumption of steam and fuel in fire engines*." Now those were not the original fire engines but the improved ones, and those that were so improved were the only ones invented for lessening the consumption of steam and fuel in fire engines; which shews that the Legislature considered the patent as a patent for the improvement of the engine described in the specification, and not as a patent for a mere method or for the original fire engine. The subject is new to me, not affecting to be a mechanic, and I have had great difficulties in making up my mind upon it. I am inclined however to think that a patent

cannot be granted for a mere principle; but I think that, although in words the privilege granted is to exercise a method of making or doing any thing, yet if that thing is to be made or done by a manufacture, and the mode of making that manufacture is described, it then becomes in effect (by whatever name it may be called) not a patent for a mere principle but for a manufacture, for the thing so made, and not merely for the principle upon which it is made. Where then is the mischief to the public, or how in this case is the intention of the Legislature defeated? They intended that after 14 years the public should from the specification be in possession of the manufacture and the art of making it, and that for those 14 years the patentee should have the monopoly of it as his reward. The patent is nothing without the specification, and the patentee can gain no advantage by it. It is also useless unless the specification be such from which the public may gain information; therefore whether the patent call the manufacture by its name, or stile it an invention, a mode, a method or in any other manner, it signifies nothing, for the specification describing the thing as required by the patent must be resorted to and may fairly be deemed a part of the patent itself. If that be so, I read this patent, and find that it is for a method to be pursued according to the directions of the specification, and looking to the specification I see that by pursuing the method pointed out a manufacture is produced by the ingenuity of the inventor, and of which the public are to have the benefit. Then the intention of the Legislature is fulfilled; the public enjoy the fruits of the author's ingenuity, and the author gets the monopoly for a certain term: It signifies nothing to either whether the patent be for the engine so made, or for the method of making it, if that method be sufficiently described in the specification. Upon these grounds, with that deference which I ought to feel upon a subject with which I do not profess myself to be much conversant, my opinion is that the judgment of the Court of Common Pleas ought to be affirmed.

LAWRENCE J. Two objections have been made by the plaintiffs in error; 1st, that this is not an invention for any formed or organized machine instrument or manufacture, but of mere principles only; 2dly, that the specification is bad. As to the first; the claim of the plaintiffs below is founded on the proviso in the statute of *James*, which allows the crown to grant patents in favour of new manufactures, and therefore it must rest on the ground of *Watt's* having invented some new manufacture. If it were neces-

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for *his invention of a method of lessening the consumption of steam and fuel in fire engines*. The method is disclosed in the specification, and it is by the addition of what is there disclosed and by managing it in the way described. The patent therefore is only for that additional improvement as described in the specification; and there is no pretence to say that he claims or could claim the sole making of the old engine. But a doubt is entertained whether there can be a patent for an addition to an old manufacture. This doubt rests altogether upon *Bircott's case* 3 *Inst.* 184; and if that were to be considered as law at this day, it would set aside many patents for very ingenious inventions, in cases where the additions to manufactures before existing are much more valuable than the original manufactures themselves. I shall content myself with referring to what Lord Chief Justice *Eyre* said in this cause in the Court of Common Pleas in answer to this passage, and to the case of *Morris v. Branston* cited by my Brother *Buller* upon the same point. If indeed a patent could not be granted for an addition it would be depriving the public of one of the best benefits of the statute of *James*. Lord *Coke's* opinion therefore seems to have been formed without due consideration, and modern experience shews that it is not well founded. The statute 15 *Geo.* 3. (I observe) secures to the patentee the privilege of constructing and selling *the engines* in words; on which account it has been objected that it falsely recites the patent, and therefore cannot operate in support of it: but the statute must have a reasonable construction to support rather than defeat the intention of the Legislature and their grant; and by attending to every part of the statute it is obvious that the engines secured to the patentee are such as are improved in the manner stated in the specification, and not the original fire engines. For the statute, reciting the patent, recites it as a grant of the benefit and advantage of making and vending "certain engines *by him invented for lessening the consumption of steam and fuel in fire engines*." Now those were not the original fire engines but the improved ones, and those that were so improved were the only ones invented for lessening the consumption of steam and fuel in fire engines; which shews that the Legislature considered the patent as a patent for the improvement of the engine described in the specification, and not as a patent for a mere method or for the original fire engine. The subject is new to me, not affecting to be a mechanic, and I have had great difficulties in making up my mind upon it. I am inclined however to think that a patent

cannot be granted for a mere principle ; but I think that, although in words the privilege granted is to exercise a method of making or doing any thing, yet if that thing is to be made or done by a manufacture, and the mode of making that manufacture is described, it then becomes in effect (by whatever name it may be called) not a patent for a mere principle but for a manufacture, for the thing so made, and not merely for the principle upon which it is made. Where then is the mischief to the public, or how in this case is the intention of the Legislature defeated ? They intended that after 14 years the public should from the specification be in possession of the manufacture and the art of making it, and that for those 14 years the patentee should have the monopoly of it as his reward. The patent is nothing without the specification, and the patentee can gain no advantage by it. It is also useless unless the specification be such from which the public may gain information ; therefore whether the patent call the manufacture by its name, or stile it an invention, a mode, a method or in any other manner, it signifies nothing, for the specification describing the thing as required by the patent must be resorted to and may fairly be deemed a part of the patent itself. If that be so, I read this patent, and find that it is for a method to be pursued according to the directions of the specification, and looking to the specification I see that by pursuing the method pointed out a manufacture is produced by the ingenuity of the inventor, and of which the public are to have the benefit. Then the intention of the Legislature is fulfilled ; the public enjoy the fruits of the author's ingenuity, and the author gets the monopoly for a certain term : It signifies nothing to either whether the patent be for the engine so made, or for the method of making it, if that method be sufficiently described in the specification. Upon these grounds, with that deference which I ought to feel upon a subject with which I do not profess myself to be much conversant, my opinion is that the judgment of the Court of Common Pleas ought to be affirmed.

LAWRENCE J. Two objections have been made by the plaintiffs in error ; 1st, that this is not an invention for any formed or organized machine instrument or manufacture, but of mere principles only ; 2dly, that the specification is bad. As to the first ; the claim of the plaintiffs below is founded on the proviso in the statute of *James*, which allows the crown to grant patents in favour of new manufactures, and therefore it must rest on the ground of *Watt's* having invented some new manufacture. If it were neces-

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fary to consider whether or not mere abstract principles are the subject of a patent, I should feel great difficulty in deciding that they are: but that consideration is unnecessary on the present occasion, because by looking at the patent and the recital in the act of parliament it appears that *Watt* applied for and obtained a patent for *an engine or mechanical contrivance* for lessening the consumption of steam in fire engines. The letters patent recite that he had invented a method of lessening the consumption of steam, and grant to him the sole right of using the said invention for 14 years. In order to see what the invention was, it is necessary to refer to the specification; that states what the invention is, and that the *method* consists in certain principles, as they are called, which are described in the specification. Then followed the statute, which after reciting that the King had granted to *Watt* the sole benefit of making and vending *certain engines* invented by him for lessening the consumption of steam in fire engines, and that he had inrolled in the Court of Chancery a description of the *said engine*, vests in him the sole right of making and selling the said engines for 25 years. From this therefore it is clear that the Legislature understood that the patent was for an engine for some mechanical contrivance, and the form of the patent and the specification does not contradict this. *Engine* and *method* mean the same thing, and may be the subject of a patent. "Method," properly speaking, is only placing several things and performing several operations in the most convenient order: but it may signify a *contrivance*, or *device*; so may an *engine*, and therefore I think it may answer the word "method." So "principle" may mean a mere elementary truth, but it may also mean constituent parts. And in effect the specification is this, "the contrivance by which I lessen the consumption of steam consists in the following principles, that is, constituent or elementary parts; a steam vessel, in which the powers of steam are to operate, to be kept as hot as the steam by a case; a distinct vessel to condense the steam; and pumps to draw off such vapour as is likely to impede the motion of the fire engine" &c. That is the description of the thing when put into different language.

Then, taking this to be a patent for an engine, it is objected that the specification is bad. In considering that question, it is necessary to see for what Mr. *Watt* has obtained his patent. He does not claim it for an improvement to a fire engine for any particular purpose, *e. g.* for raising water out of mines or any other specific thing:

thing: but his claim is generally to an invention for lessening the consumption of steam applicable to all fire engines for whatever purpose they may be used and whatever may be their construction, by an alteration of and addition to parts which are common to all and upon which their powers of working depend. The objection, that requires a more full description of the engine, goes the length of requiring a description of every engine that is acted upon and worked by the force of steam. But I do not think that, if, his specification had been so comprehensive, his invention would have entitled him to a patent for the sole vending and making the whole engine so altered and improved; for such patent would have been more extensive than the thing invented. The patent must be supported as granted for an improvement and addition to old engines known and in use, and I think that the patent is good in this point of view. For *Watt* claims no right to the construction of engines for any determinate object, except that of lessening the consumption of steam and fuel in fire engines. His patent supposes the existence of such engines, and his contrivance method or engine is for lessening the consumption of fuel in such pre-existing engines, and for nothing else. In the argument the engine to diminish the consumption of steam was confounded with that which it was intended to improve. Some of the difficulties in the case have arisen from considering the word *engine* in its popular sense, namely, some mechanical contrivance to effect that to which human strength, without such assistance, is unequal: but it may also signify "device"; and that *Watt* meant to use it in that sense and that the Legislature so understood it is evident from the words "engine" and "method" being used as convertible terms. Now there is no doubt but that for such a contrivance a patent may be granted as well as for a more complicated machine; it equally falls within the description of a "manufacture"; and unless such devices did fall within that description no addition or improvement could be the subject of a patent. If this be so, it only remains to be considered whether or not for the improvement of fire engines *Watt* has with sufficient accuracy stated a definite alteration or addition, which may be made in all fire engines, in such a way as to enable a workman to execute it; and it seems to me that he has. For he has directed him to make a vessel for the condensation distinct from that in which the powers of steam operate, and to convey the steam as occasion requires from the cylinder to the condensing vessel, to keep the cylinder hot by means

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distinctly described, and to extract by pumps the vapour which may impede the work. Therefore it seems to me that he has given distinct directions for the purpose: whether those directions were or were not sufficient is not now a question for our decision; it was a question for the determination of the jury, and they have decided it.

Per Curiam

Judgment affirmed.

Saturday,
Jan. 26th.

The KING *against* The Inhabitants of CHIPPING
WARDEN.

An apprentice agreed with his master to purchase the rest of his time, and that the indentures should remain with the master till payment of the sum stipulated, part of which only was paid; before the expiration of the time he served another man at the recommendation of his original master above forty days; this was holden to enure as a service under the indentures.

TWO justices by an order removed *R. Lymath*, Ann his wife and their five children by name, from the parish of *Chipping Warden* in the county of *Northampton* to the parish of *Great Robright* in the county of *Oxford*; upon appeal the Sessions quashed the order, subject to the opinion of this Court on the following case. The pauper *R. Lymath* was born in the parish of *Brailes*, and in 1776 was bound apprentice by indentures to *W. Goodwin* blacksmith of the parish of *Great Robright* for the term of five years. He continued in the service of *Goodwin* at *Robright* for two years and a half under the said indentures, when his master left off business and went to reside in the parish of *Marston*. At that time the pauper agreed verbally with his master that he (the pauper) should give him 7*l.* for the rest of his time, his master not wishing to turn him over to any one; and it was agreed that the master should keep the indentures in his custody till the 7*l.* was paid, which was to be discharged from time to time as the pauper could earn it and could make it convenient to pay it. The pauper considered himself at liberty to work with any master he pleased, and did work with different masters until the harvest of 1779, when at the request of his former master *Goodwin* he came to serve him as a labourer for about a month, and received his wages according to the rate usually given to labourers in the time of harvest; the amount being deducted from the 7*l.* which the pauper had agreed to pay to *Goodwin*. *Goodwin* afterwards recommended the pauper to serve one *Cherry* a blacksmith in *Marston*, into whose service he went with the knowledge of *Goodwin*, and continued therein about twelve months. The indentures were not delivered up until five or six years after the apprenticeship had expired.

Perceval, *Dayrell*, and *Perkins*, in support of the order of Sessions, were stopped by the Court.

B. Morice and *Vaughan*, contra, contended that the pauper's settlement was in *Great Robright*, and that no settlement was gained in *Marston* by the service with *Cherry* either as an apprentice or hired servant, according to the case of *R. v. Sandford* (a). There the master and the apprentice considering the indentures as discharged, when in point of law they were still subsisting, it was holden that no subsequent service with another master, though at the recommendation of the original master could enure as a service under the indenture. The fact of the master's keeping back the indentures in this case, in order to secure the payment of the sum stipulated for their relinquishment, may be relied on as shewing his intention to consider the apprentice as still continuing in the same relation to him; but that is not stronger than the fact stated in *R. v. Sandford*, that the original master desired the subsequent master to keep back some of the pauper's wages to provide him with clothes, under the apprehension that he would otherwise come upon him; for that plainly shewed that he considered himself still liable to provide for his apprentice, notwithstanding he had given him up the indentures, which he had no right to do (it being a parish binding) without the consent of the parish officers who were parties thereto. Whereas here both parties considered the indentures as in effect cancelled for the consideration which was agreed to be paid, and which was in fact partly discharged. But in order to gain a settlement under indentures of apprenticeship by serving a second master, it is not only necessary that the indentures should continue in existence, but it must also appear that it was the intention of all the parties that the service should be under the indentures. The recommendation by the master to the pauper to serve *Cherry* cannot vary the case according to the case before cited, where *Buller J.* said that a mere recommendation is not sufficient, but there must be an express consent by the first master to any other service; and no such consent is stated here.

Lord KENYON Ch. J. It is clear that in general an apprentice is not capable of contracting the relation of servant to any other master until the end of the term for which he was bound. But it is equally clear that if the master and apprentice put an end to the

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(a) *Ante*, 1 vol. 281.

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apprenticeship by mutual consent, it is the same as if the indentures had never been executed, and the latter may gain a settlement by hiring and service with any other master before the expiration of the time which he was bound to serve as an apprentice. Then there is a third case, that where the apprentice leaves his master and enters into the service of another, if the indentures still subsist, he is not *fui juris* but is incapable of gaining a settlement by serving another master unless he serve with the consent of his former master, and in such case he gains a settlement, not as an hired servant but, as an apprentice. These are axioms in this branch of settlement law, and cannot now be called in question. Now what are the facts of this case; the pauper was bound an apprentice to a master residing in *Great Robright*, who two years afterwards discontinued business; at this time the parties did not put an end to the apprenticeship, but on the contrary the apprentice agreed to pay 7*l.* to the master who was to keep the indentures until that sum was paid; the master all this time keeping a control over the apprentice. The pauper then went into different situations, and among the rest he served a person of the name of *Cherry*, into whose service he went at the recommendation and with the knowledge of his first master, the indentures still continuing in force. Then according to all the authorities this must be deemed a service under the indentures. The case of *R. v. Sandford* differs from the present in a very essential point. There the parties did all they could to put an end to the apprenticeship; but here they agreed that the indentures should continue in force. My opinion in this case does not proceed on the ground that the pauper served *Cherry* a year as an hired servant, but that he served him under the indentures of apprenticeship with the consent of his original master.

Per Curiam

Order of Sessions affirmed (a).

(a) Vid. *R. v. The Inhabitants of the Holy Trinity in the Minories*; *Ante*, 3 vol. 605.

Saturday,
Jan. 26th.

MAYHEW *against* PARKER and Others.

A warrant to
arrest the
party "to
the end that
he may be-
come bound

&c. to appear at the *next Sessions &c.*" means the next Session after the arrest, and not after the date of the warrant. Therefore the officer executing it may justify an arrest after the Sessions next ensuing the date of the warrant.

IN trespass for an assault and false imprisonment the defendants gave in evidence a warrant under the hand and seal of Lord *Kenyon*, which after reciting that it was certified that at the general

Session of oyer and terminer at the *Old Bailey* on the 11th of *January* 37 *Geo.* 3. the plaintiff was and stood indicted for perjury, to which indictment he had not appeared or pleaded, required and commanded the defendants (peace officers) to apprehend the plaintiff and bring him before one of the Judges of the Court of K. B. &c., "to the end that he may become bound with sufficient sureties for his personal appearance at the next Sessions of oyer and terminer of our lord the King to be holden for the city of *London* to answer the said indictment, and be further dealt with according to law"; dated the 21st of *January* 1797. It appeared that the arrest was not actually made until about ten months afterwards. It was objected at the trial before Lord *Kenyon* at the last Sittings at Guildhall that, as the arrest was not made before the *Old Bailey* Sessions next ensuing the date of the warrant, the warrant was no longer in force and could not justify an arrest and imprisonment afterwards: but Lord *Kenyon*, being of a different opinion, nonsuited the plaintiff.

Garrow now renewed the same objection on a motion to set aside the nonsuit; and said that the usual practice in these cases was to renew these warrants at every Sessions if not executed before, and that great inconvenience would ensue if it were otherwise, as warrants of arrest might be kept back to answer particular purposes, and not executed till long after they were granted. But

Lord KENYON Ch. J. said that the fair construction of such a warrant was, that the party to be arrested should be made to appear at the next Sessions after the arrest; and that the only purpose which the practice alluded to could answer was that of enhancing the expence to prosecutors and putting money into the pockets of the officers. That, if any person misconducted himself by keeping back warrants of arrest to be afterwards made use of for vexatious or improper purposes, he subjected himself to an action for a malicious prosecution at the suit of the party grieved: but the warrant was a sufficient justification in trespass to the officer charged with the execution of it.

Per Curiam

Rule refused.

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Tuesday,
Jan. 29th.

MARY JANE ROPER Dowager Lady DACRE *against*
DOE Lessee of GERTRUDE Baroness DACRE ; in
Error.

Devise "to
and amongst
the devisor's
seven sisters
(he having
eight) for
life share and
share alike,
and after the
decease of
any of them
her share to
go to her first
and other
sons in tail,
and in de-
fault of such
sons to and
amongst her
daughters as
tenants in
common in
tail; and in
case any of
his said seven
sisters died
without leav-
ing any is-
sue of her
body begot-
ten or such
issue died be-
fore twenty-
one and
without is-
sue, then to
and amongst
the survivors
of his said se-
ven sisters and
their issue to
descend in
like manner
as before
mentioned;
and in case
all his said
seven sisters
should die
without issue
or such issue
should all die
before twen-
ty one and
without is-
sue," then
over: Held
that the

words in *default of such sons* did not make the remainder to the daughters depend on the contingency of there being no son born, but that on the death of the sons of any of the sisters without issue, the remainder to the daughters of such sister took effect.

THE Court of Common Pleas having given judgment (a) in this ejectment upon a special verdict for the original plaintiff, a writ of error was brought in this court. The ejectment was for certain manors messuages and lands in the county of *Middlesex*, and a special verdict was found in substance as follows; *John Trevor* being seised in fee of the premises in question, by will duly executed dated the 5th of *April* 1743, devised his capital mansion-house of *Glynde* in *Sussex* and the demesne lands thereto belonging and all his estates in *Sussex* to his kinsman Doctor *R. Trevor* in fee; to whom he also gave his leasehold property in the same county, and certain of his personalty in the house of *Glynde*, he then gave to his sister Mrs. *Rice* an annuity of 300 *l.* for her life, payable out of his estates in *Middlesex Denbigh* and *Flint*. He also charged the same estates with another annuity of 50 *l.* during the life of *E. Forster*. He also gave 1000 *l.* a-piece to his nephew *George*, and his niece *Lucy*, the children of his sister Mrs. *Rice*, charged on the same estates in default of his personal estate. He then devised as follows; "Item I give devise and bequeath all my manors lands &c. in *Middlesex Denbigh* and *Flint* or elsewhere not before disposed of, subject to the charges before mentioned, unto and amongst my sisters *Grace Trevor*, *Mary Trevor*, *Ann* the wife of *G. Boscawen*, *Margaret*, *Ruth*, *Gertrude*, and *Arabella Trevor*, during their natural lives respectively share and share alike, and from and after the decease of any of them then the part or share of her or them so dying to go to the first and other sons of such of them so dying and the heirs of his and their bodies successively in tail, and in default of such sons then to and amongst the daughters of my said sisters so dying, as tenants in common, and not as joint-tenants, and to the heirs of their respective bodies issuing: but in case any of my said seven sisters last mentioned shall die without leaving any issue of her body begotten, or that such issue shall die before he or she shall attain his or her age of twenty-one years and without

(a) See *Eof. & Pul.* 250.

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issue, then I give her share to and amongst the survivors or survivor of my said seven sisters and their issue, to go and descend in like manner as before is mentioned as to the shares parts or proportions before given to them respectively." He then bequeathed the overplus of his personal estate, subject to his debts and legacies to his said seven sisters, and he appointed his two sisters *Ann* and *Margaret* executrices. The will then proceeds thus; "In case all my said seven sisters shall happen to die without issue, or leaving issue such issue shall all die before he she or they shall attain the age of twenty-one years and without issue, then my said estate in *Middlesex* and *Wales*, subject as aforesaid, shall go to and be enjoyed by such person or persons who shall then be entitled to my said estate in *Suffex* hereinbefore devised, according to this my will; and in such case I do hereby devise the same to such person or persons accordingly."—The deviser died on the 9th *September* 1743 leaving *Lucy Rice* and his seven other sisters his co-heiresses him surviving. On his death those seven sisters, his devisees, entered and were seised as tenants in common. One of them, *viz.* *Gertrude* on the 27th of *July* 1744 married the Honourable *Charles Roper*, by whom she had issue *Trevor Charles Roper*, (afterwards Lord *Dacre*,) and *H. Roper* who died, and *Gertrude* now Baroness *Dacre* (the lessor of the defendant in error). On the 4th of *February* 1754 *Charles Roper* died, leaving his widow *Gertrude* sole seised of her undivided seventh part of the premises in question. In 1764 *Ruth Trevor* one of the seven sisters died without having been married, as did also *Margaret* another of them in 1770. On the 2d of *March* 1773 *Trevor Charles Roper* (the son of *Gertrude*) married the plaintiff in error; previous to and in contemplation of which marriage a recovery (a) was suffered of the one undivided fifth part of the premises of which his mother *Gertrude* was seised for life with remainder to him (her eldest son) in tail; and the same was settled to the use of *Gertrude* for life, remainder to *Trevor Charles Roper* for life, remainder to trustees &c, remainder to the first and other sons of the marriage in tail male, remainder to the daughters' as tenants in common in tail general, with cross remainders &c; remainder to the use of the said *Trevor Charles Roper* in fee. On 3d *May* 1775 *George Boscawen* died, whereby his wife *Ann* became sole seised for life of her undivided fifth part of the pre-

(a) The recovery was not set forth at length in this special verdict; it was stated according to it's legal effect.—See *Doe v. Halcombe*, ante, 7 vol. 716.

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misses. On the 21st of *March* 1780 *Mary Trevor* died unmarried; whereby her fifth became divided between her four surviving sisters *Grace Trevor*, *Ann Boscawen*, *Gertrude Roper*, and *Arabella Trevor*. On the 13th of *July* 1780 *Gertrude Roper* died, whereby her one-fifth of the whole, of which a recovery had been suffered on her son's marriage, and her one-fourth of her sister *Mary's* one-fifth, descended to *Trevor Charles Roper* her eldest son. On the 2d of *April* 1784 *Ann Boscawen* died leaving *George* her eldest son and heir at law, to whom descended her undivided fifth part of the whole and her one-fourth of her sister *Mary's* one-fifth. On the 13th of *January* 1786 *Trevor Charles Roper* became Lord *Dacre*; and on the 21st of *December* 1788 his younger brother *Henry Roper* died without issue. On the 21st of *September* 1789 *Arabella Trevor* died unmarried whereby her one-fifth of the whole, and her undivided fourth of her sister *Mary's* fifth part, became divided in thirds amongst *Grace Trevor*, *Trevor Charles Lord Dacre*, and *George Boscawen*. On the 25th of *August* 1790 *Trevor Charles Lord Dacre* made his will duly executed to pass real estates, whereby he devised to his wife the plaintiff in error all his property both personal and real for ever; and he died on the 3d of *July* 1794 without issue. At the time of his death, he the said *Trevor Charles Lord Dacre*, the said *George Boscawen*, Lord *Dynavor* (grandson and heir of *Lucy Rice*), and *Grace Trevor*, were the heirs at law of *John Trevor* the devisor first mentioned. On Lord *Dacre's* death the plaintiff in error his widow and devisee entered not only into his one undivided fifth of which a recovery had been suffered (and to which she was certainly entitled) but also into the undivided fourth of his aunt *Mary's* fifth by him held, and into the undivided third of his aunt *Arabella's* fifth, and also into the third of her undivided fourth of her sister *Mary's* fifth by him also held as tenant in tail; for which three last undivided parts the present ejectment was brought by Lord *Dacre's* only sister the present lessor of the plaintiff.

This case was argued in *Michaelmas* term last by *Wood* for the plaintiff in error, and *R. Smith* contra, and in this term by *Chambre* for the plaintiff in error, and *Gibbs* contra. But it is thought unnecessary to enter into the detail of the arguments, which turned principally on the apparent intention of the devisor, especially as the same arguments are in print in the reports of this case in the

Court of Common Pleas (a). The plaintiff in error contended that the devise over to the daughters "and in default of such sons &c," was only to take place in case there should be no sons born of any of the devisor's sisters, and was therefore contingent, and there having been a son born, the remainder to the daughter of *Gertrude* (the lessor of the plaintiff below) never took effect; and then the estate descended to the heirs at law of the devisor from one of whom the plaintiff in error claims, it being clearly the intention of the devisor that the ultimate remainder to Doctor *Trevor* should not take effect so long as any of the children of his own sisters should be living. And the cases principally relied on were *Keene d. Pinnock et Ux v. Dickson*, B. R. M. 24 Geo. 3. and *Denn d. Briddon et Ux v. Page*, in the same term; both of which are referred to in the Reports in *C. B.*

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On the other hand it was contended that those words meant no more than *on failure of sons or of the estates before devised to the sons and the heirs of their bodies*; and that the intention of the devisor was to give estates for lives to his seven sisters, remainder to their first and other sons in tail, remainder to the daughters as tenants in common in tail, with cross remainders to the sisters and their issue in case any of the sisters died without issue or such issue died before twenty-one. And in support of this construction the counsel relied much on the ultimate remainder to Doctor *Trevor* being given over upon the event of all the seven sisters dying without issue, (*i. e.* male or female,) or such issue dying before twenty-one and without issue.

Lord KENYON Ch. J. The question is whether the mere birth of a son of one of the sisters put an end to all the subsequent limitations of that portion; and in order to determine this, it becomes necessary to consider the whole of the will, and particularly the last clause in it, which is this "In case all my said seven sisters shall happen to die without issue, or leaving issue such issue shall all die before he she or they shall attain the age of twenty-one years and without issue, then my said estate in *Middlesex* and *Wales*, subject as aforesaid, shall go to and be enjoyed by such person or persons who shall then be entitled to my said estate in *Suffex* hereinbefore devised according to this my will." Here the intention of the devisor seems to be expressed in terms which cannot be misunderstood. If the seven sisters take an estate-tail, the whole of this clause will have effect: but if they do not take an

(a) Vid. 1 Bos. & Pull. 250.

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estate-tail, that part the limitations of which are defeated by the birth of a son will not go to Doctor *Trevor*, but to the heirs at law of the devisor, one of whom the devisor intended should not take; and that shews the importance of the argument derived from the observation that there was an eighth sister, who was excluded by the limitations to the seven other sisters. This circumstance alone would be sufficient to decide this case. But, independently of this, I think that the former clause in the will would create an estate-tail in the sisters. In the construction of wills we cannot do better than adopt the rule mentioned by Lord *Hale*, *noscitur à sociis*. Now here an estate-tail is given in the same clause to the sons of the sisters, and then "in default of such sons" the limitations are to the daughters: but it is contended that there is a slip in the expression used in making this limitation, and that the devisor did not intend that the portion of either of the sisters should go to her daughter if she had a son born: but on weighing and considering every part of this clause I have no doubt but that the devisor intended that the sisters should take estates-tail. But the case of *Denn d. Briddon v. Page* has been relied on by the plaintiffs in error, where Lord *Mansfield* intimated an opinion that there was a blunder in the will. I find myself pressed by whatever fell from so great a judge, and it is always with doubt and distrust of my own mind that I differ from him in opinion: but I am not prepared to say that there was any blunder in that will. There the devisor gave to *S. Nash* the son of *T.* and *M. Nash* for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of *S. Nash* and the heirs male of his and their bodies; then having provided for the male heirs (who are in general the favourites in cases of landed property) it is not improbable that it should occur to the testator to provide for the present generation, and therefore he devised to all and every the daughters of the body of *T. Nash* by his then wife, and for default of such issue to the right heirs of *T. Nash* for ever. Now when there is nothing in the will to lead to such a supposition, why should it be supposed that that was a blunder that brought forward the daughters of sons in preference to the issue of the sisters? I have known many cautious testators make limitations in their wills like that. Here the word "sons" has been slipped in instead of "issue" in one place; but it is supplied in another. And on the whole I have no doubt but that the judgment given in the Court of Common Pleas ought to be affirmed.

ASHHURST J. On reading the whole will it is evident that by the words "and in default of such sons" the devisor meant "failing the limitation," then over. Therefore I concur in the opinion given by Lord *Kenyon*.

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GROSE J. The question here is, whether the words "in default of such sons" are not to be understood as meaning that "that limitation failing" the limitations to the daughters and their issue should take effect, or whether by the birth of a son the limitations to the daughters should be defeated; every word in this will shews (I think) that the former was the intention of the devisor. He intended first that the sons should take estates-tail, and when that limitation failed that the daughters should take in remainder. The limitation to the daughters shews that this was his intention; and if there were any doubt on the construction of that part of the will, the last devise removes all doubt, for there the devise over of the estates in *Middlesex* and *Wales* is only to take place "in case all his seven sisters should die without issue &c." It is said however that, though we may conjecture that this was the devisor's intention, the words of the will do not prove it; and the counsel for the plaintiff in error went into a minute comment on the particular penning of the will: but if we comment very minutely on the words in the will, I think I can read them so as to make the construction which we put on the whole consistent with every word. The words after the limitation to the sisters and their first and other sons &c are "and in default of such sons *then* to and amongst the daughters" &c: but when is that to take place? at the time of the deaths of the sons. This mode of reading the words is consistent with the whole will: but in order to support the construction we put upon the will I am not driven to this argument, because considering the whole will together, and particularly the last clause it, I am clearly of opinion that it was the devisor's intention that the limitation to the daughters should take effect when the limitation to the sons failed.

LAWRENCE J. The limitation, on which the argument for the plaintiff in error is built, is to the first and other sons and the heirs of his and their bodies successively, and in default of *such* sons then to and amongst the daughters &c, that is, in default of a first and other sons, for those are the words immediately preceding. Now that is equivalent to a limitation to the first, second, third, and fourth, sons &c, and the limitation over "in default of such sons" is the same as if it had been in words "in default of a first, se-

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cond, third, and fourth, sons &c ;" that is, " if there be but one son," I give to the daughters of my sisters on the failure of a second son ; if there be two sons, and no third son, then on the failure of a third son, and so on. So that according to this construction, whenever there is a failure or default of a second third or other son, who would be entitled to take on the death of a prior son without issue, the daughters of the sisters shall take. And this obviates the objection, that the construction contended for by the defendant in error will exclude the daughters of sons ; for if there be a son who leaves a daughter, that daughter would take, and if she died without issue, and there were no second third or other son of the devisor's sister to take, then there would be a default of sons, and the limitation to the daughters of the devisor's sisters would take effect. So that if there were a first and second son and the second should die leaving daughters, and then the first son should die without issue, the daughters of the second son would take the remainder in tail vested in their father ; and if they were to die without issue and there were no third son, then there would be a default of sons, and the remainder to the daughters of the sisters would take effect.

Judgment affirmed.

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ROE on the Demise of GEORGE READE against
WILLIAM READE.

A. having an estate of his own in the county of B. and another in C., and having also the legal but no beneficial interest in an estate in D. with power of appointing it to either of his sons, by will devised " all his estates of what nature or kind soever in the county of B. and at — in

ON the trial of this ejectment for lands in the county of *Southampton*, a special case was reserved for the opinion of this Court.

P. Rooke, being seised in fee of the premises in question, by will dated the 13th of *July* 1752 devised them to his wife for life, and after her decease to his brother in law *G. Reade* and his heirs upon the following trust, " That he the said *G. Reade* or his heirs or assigns do and shall sell give devise or otherwise dispose of all that my said messuage &c (describing the premises) unto and amongst his four children *G. G. Reade*, *W. Reade*, *B. Reade*, and *J. Reade*, in such manner and in such shares and proportions and with and under such directions and restrictions as the said *G. Reade* shall by any deed or last will and testament duly executed &c give

held that the trust estate that he had the power of appointing did not pass by this general devise.

direct

direct limit or appoint the same." *G. G. Reade*, the eldest son of the devisee *G. Reade*, died in 1754 in the lifetime of the testator (*P. Rooke*,) leaving an only son *G. Reade* father of the lessor of the plaintiff, an infant. After the death of *P. Rooke*, namely on the 25th of *April* 1769, *G. Reade* the devisee by deed (after reciting the will and death of *P. Rooke* and the death of *G. G. Reade*) appointed three full and equal undivided four parts of the premises in question to his three surviving children *W. Reade*, *Jane Willis* formerly *Reade*, and *B. Reade*, and their heirs equally to be divided between them share and share alike as tenants in common. By indenture dated 1st *August* 1769 and by a fine levied in that year the said three undivided fourth parts were so limited by *W. Reade*, *J. Willis*, and *B. Reade*, that one of the said undivided fourth parts is now vested in the plaintiff and the remaining two fourth parts are vested in the defendant; and for these parts the plaintiff and defendant have respectively obtained absolute verdicts. In *September* 1770 *B. Rooke*, the widow of the deviser, died. *G. Reade*, son of *G. G. Reade*, attained his age of twenty-one in 1773, and died in 1775, leaving the lessor of the plaintiff his only son, an infant. *Jane Willis* formerly *Reade*, having survived her husband, died on the 14th of *November* 1777 intestate and without issue. *B. Reade* died without issue, and intestate, on the 8th of *November* 1779. *G. Reade*, the devisee and trustee under *P. Rooke*'s will, by will dated 19th of *December* 1780 (after reciting that certain lands in *Dorsetshire* stood limited by indentures of release to the use of himself for life and after his decease to the use of trustees on trust to sell and convey the same to the use of his two daughters *J.* and *B.* in fee, and that he had power with the consent of the trustees by deed or will to make void those indentures and all estates and uses thereby limited, and to declare any other estates or uses to all or either of his four children,) by virtue of his power and with the consent of the trustees made void the said indentures and revoked the uses &c, and declared that the trustees should immediately after his decease stand seised of those premises to the use of his son *W. Reade* in fee; he also devised some other lands in *Wiltshire* to his said son *W. Reade* in fee, and concluded thus; "and all the rest and residue of my ready money and securities for money stocks in the public funds goods chattels real and personal estate and effects whatsoever and wherefoever and of what nature or kind soever as well copyhold estates as all other situate in *Damerham*, *South Martin*, and *Tidpitt* in the

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cond, third, and fourth, sons &c ;" that is, "if there be but one son," I give to the daughters of my sisters on the failure of a second son; if there be two sons, and no third son, then on the failure of a third son, and so on. So that according to this construction, whenever there is a failure or default of a second third or other son, who would be entitled to take on the death of a prior son without issue, the daughters of the sisters shall take. And this obviates the objection, that the construction contended for by the defendant in error will exclude the daughters of sons; for if there be a son who leaves a daughter, that daughter would take, and if she died without issue, and there were no second third or other son of the devisor's sister to take, then there would be a default of sons, and the limitation to the daughters of the devisor's sisters would take effect. So that if there were a first and second son and the second should die leaving daughters, and then the first son should die without issue, the daughters of the second son would take the remainder in tail vested in their father; and if they were to die without issue and there were no third son, then there would be a default of sons, and the remainder to the daughters of the sisters would take effect.

Judgment affirmed.

Tuesday,
Jan. 29th.

ROE on the Demise of GEORGE READE *against*
WILLIAM READE.

A. having an estate of his own in the county of B. and another in C., and having also the legal but no beneficial interest in an estate in D. with power of appointing it to either of his sons, by will devised "all his estates of what nature or kind soever in the county of B. and at — in the county of C., or elsewhere in the kingdom of England after payment of his debts &c" to a younger son: held that the trust estate that he had the power of appointing did not pass by this general devise.

ON the trial of this ejectment for lands in the county of *Southampton*, a special case was reserved for the opinion of this Court.

P. Rooke, being seised in fee of the premises in question, by will dated the 13th of *July* 1752 devised them to his wife for life, and after her decease to his brother in law *G. Reade* and his heirs upon the following trust, "That he the said *G. Reade* or his heirs or assigns do and shall sell give devise or otherwise dispose of all that my said messuage &c (describing the premises) unto and amongst his four children *G. G. Reade*, *W. Reade*, *B. Reade*, and *J. Reade*, in such manner and in such shares and proportions and with and under such directions and restrictions as the said *G. Reade* shall by any deed or last will and testament duly executed &c give

direct

direct limit or appoint the same." *G. G. Reade*, the eldest son of the devisee *G. Reade*, died in 1754 in the lifetime of the testator (*P. Rooke*,) leaving an only son *G. Reade* father of the lessor of the plaintiff, an infant. After the death of *P. Rooke*, namely on the 25th of *April* 1769, *G. Reade* the devisee by deed (after reciting the will and death of *P. Rooke* and the death of *G. G. Reade*) appointed three full and equal undivided four parts of the premises in question to his three surviving children *W. Reade*, *Jane Willis* formerly *Reade*, and *B. Reade*, and their heirs equally to be divided between them share and share alike as tenants in common. By indenture dated 1st *August* 1769 and by a fine levied in that year the said three undivided fourth parts were so limited by *W. Reade*, *J. Willis*, and *B. Reade*, that one of the said undivided fourth parts is now vested in the plaintiff and the remaining two fourth parts are vested in the defendant; and for these parts the plaintiff and defendant have respectively obtained absolute verdicts. In *September* 1770 *B. Rooke*, the widow of the deviser, died. *G. Reade*, son of *G. G. Reade*, attained his age of twenty-one in 1773, and died in 1775, leaving the lessor of the plaintiff his only son, an infant. *Jane Willis* formerly *Reade*, having survived her husband, died on the 14th of *November* 1777 intestate and without issue. *B. Reade* died without issue, and intestate, on the 8th of *November* 1779. *G. Reade*, the devisee and trustee under *P. Rooke*'s will, by will dated 19th of *December* 1780 (after reciting that certain lands in *Dorsetshire* stood limited by indentures of release to the use of himself for life and after his decease to the use of trustees on trust to sell and convey the same to the use of his two daughters *J.* and *B.* in fee, and that he had power with the consent of the trustees by deed or will to make void those indentures and all estates and uses thereby limited, and to declare any other estates or uses to all or either of his four children,) by virtue of his power and with the consent of the trustees made void the said indentures and revoked the uses &c, and declared that the trustees should immediately after his decease stand seised of those premises to the use of his son *W. Reade* in fee; he also devised some other lands in *Wiltshire* to his said son *W. Reade* in fee, and concluded thus; "and all the rest and residue of my ready money and securities for money stocks in the public funds goods chattels real and personal estate and effects whatsoever and where-soever and of what nature or kind soever as well copyhold estates as all other situate in *Damerham*, *South Martin*, and *Tidpitt* in the

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said county of *Wilts* and *Aldbolt* in the said county of *Dorset* or elsewhere in the kingdom of *England*, after payment of my debts legacies and funeral expences, I give devise and bequeath unto my said son *W. Reade* his heirs executors &c." The said *G. Reade* died in *January* 1783. The lessor of the plaintiff is heir at law to *P. Rooke*, *G. Reade* the devisee, *G. G. Reade* his son, *G. Reade* his grandson, and *J. Willis* and *B. Reade* his daughters: he attained his age of twenty-one in 1796. The defendant is the *W. Reade* mentioned in the will of *P. Rooke*. The question is whether the plaintiff is entitled to recover more than the fourth part for which he has obtained a verdict; and if he is, the verdict is to be entered accordingly.

R. Smith for the plaintiff. The plaintiff claims the disputed fourth part as heir at law of *G. Reade*, the devisee and trustee under the will of *P. Rooke*. The defendant, if he have any claim, must claim it under the residuary clause in the will of that *G. Reade*. But it could not pass under that clause as part of the devisors estate; for though general words are there used "or elsewhere in the kingdom of *England*," their general import is controlled by the apparent intention of the devisor as collected from the accompanying words. He had before made a particular enumeration of his property, which affords a strong presumption that he did not intend to pass any thing else. Nor could it pass by that clause, as under an execution of the power given to him by *P. Rooke's* will. It is manifest from a former part of the will that he knew how to execute such a power; for there he executed a similar power in a formal manner respecting some lands in *Dorsetshire*; from which it is inferred that if he had intended by his will to execute the power of appointment given to him by *Rooke's* will, he would have executed that also in the same manner. Besides he subjected all that he gave by this residuary clause to the payment of his debts and funeral expences: it is clear therefore that he did not intend to give any thing by this clause that was not subject to his debts, and the premises in question, which he held only as trustee, were not subject to his debts.

Pell contra. First; the legal estate in this fourth part passed to the defendant under the residuary clause in *G. Reade's* will. It was not necessary for the devisor, when disposing of it, to refer to it in terms as an execution of the power: it is sufficient if it appear on the whole will that he intended that it should pass. It is evident that he knew that he had such a power of appointment;

because in the deed of *April 1769* he recited the will of *P. Rooke* and his own power of appointing the whole, and there he appointed three fourth parts. And it is clear that he meant to dispose of the remaining fourth part by this residuary clause in his will; for after having disposed of his own lands in *Wiltshire* and *Dorsetshire* he added "or elsewhere in the kingdom of *England*;" and the latter words will have no effect unless they extend to the premises in question. Besides they are coupled with the preceding words "his real and personal estate of *what nature or kind soever*," as if he were particularly anxious to pass those lands that he had as trustee, and over which he had the power of appointment, as well as his own lands. In *Standen v. Standen* (a), where the testatrix, having a power of appointing a moiety of the produce of her late husband's lands and personalty by deed or will, by a residuary clause in her will similar to that in the present case gave all the rest and residue of her estate and effects of what nature or kind soever &c to *S. H.*, it was ruled that the lands (for the real estate had not been sold) that she had the power of appointing passed by that clause. Secondly; but if the defendant have not the legal estate in this disputed fourth part, he has such a clear equitable estate in it that his trustee, the lessor of the plaintiff, cannot be permitted to set up the legal estate against him.—But this point was not pressed, the Court expressing in the course of the argument a decided opinion that the person who has the legal estate must prevail in a court of law.

Smith in reply. The case of *Standen v. Standen* is distinguishable from the present; for there the testatrix was not confined to any particular objects in making her appointment, as this deviser was, and therefore that power was in the nature of property, and so was considered by the Lord Chancellor in deciding that case. And in *Buckland v. Barton* (b) Lord Chief Justice *Eyre* said "It is clear from the latter cases that a mere devise of the residue does not amount to an execution of the power of appointment." The words in this residuary clause "of what nature or kind soever" are explained by those that immediately follow "as well copyhold estates as all other &c."

Lord KENYON Ch. J. Without considering whether or not any question of equity may hereafter arise between the parties, it must be remembered that this question arises in a court of law. The lessor of the plaintiff claims the disputed fourth part as the

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(a) 2 *Vez. jun.* 589.(b) 2 *H. Bl.* 138.

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heir at law of *G. Reade*, and he is entitled to it by descent unless it were given away from him by the residuary clause in *G. Reade's* will. That clause is relied upon for this purpose by the defendant; and undoubtedly the words are sufficiently comprehensive to pass this fourth, if it can be collected from the will that the deviser intended that it should thereby pass. In *Chester v. Chester* (a) it was holden that a remote reversion passed by a general residuary clause, it appearing to be the testator's intention that it should pass. But all this doctrine was fully considered by this Court, and afterwards in the House of Lords, in the case of *Strong v. Teate* (b), where it was determined that the general words in a will may be restrained in cases where it appears that the deviser did not intend to use them in their general sense. Now in this case the trustee (the deviser) had no beneficial interest in himself; he was a mere naked trustee, though the use was executed in him. And when he set about to make a disposition of his property by his will he used general words in the residuary clause, giving all his estates "after payment of his debts legacies and funeral expences:" Now these latter govern and restrain the general effect of the former words, and shew that he only meant to give that in which he had a beneficial interest and which he had a power of charging with the payment of his own debts. But it is clear that he could not subject the estate in question to his own debts; this satisfies me that he had no idea of disposing of the trust estate; and therefore I think, on the authority of *Strong v. Teate*, that the estate in question did not pass by the residuary clause in this will. The case of *Standen v. Standen* is distinguishable from the present for the reason given by the plaintiff's counsel: there the objects of the power were not limited, and the testatrix might have subjected that estate to the payment of her own debts.

With respect to the other point made in this case, the opinion I have several times given on it since I have sat here remains unshaken. I agree with what was said in *Lade v. Holford* (c) that, where the beneficial occupation of an estate by the possessor has given reason to suppose that possibly there may have been a conveyance of the legal estate to the person who is equitably entitled to it, a jury may be advised to presume a conveyance of the legal estate: but if it appear in a special verdict, or special case, that the legal estate is outstanding in another person, the party not clothed with that legal estate cannot recover in a court of law; and in this

(a) 3 P. Wms. 55.

(b) 2 Burr. 912.

(c) 3 Burr. 1416. & Bull. N. P. 110.

respect I cannot distinguish between the case of an ejectment brought by a trustee against his cestuique trust and an ejectment brought by any other person.

GROSE J. I think that the description of the estates in the residuary clause is very important. The deviser had an estate of his own in *Wiltshire* and another in *Dorsetshire*: in the residuary clause he enumerates these by name; and the following words "or elsewhere in the kingdom of *England*" must mean estates ejusdem generis, his own estates. And this construction is confirmed by the other words "after payment of my debts &c," which clearly shews that he did not intend to comprehend his trust estate.

Per Curiam,

The plaintiff is entitled to a moiety.

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COHEN *against* CUNNINGHAM and Another.

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IN trover for goods seized under a commission of bankrupt a verdict was taken for the plaintiff, subject to the opinion of this Court upon the following case, in which the only question intended to be argued was the validity of the petitioning creditor's debt.

The plaintiff's property in the goods and the conversion of them by the defendants (subject to the above question) were admitted. The plaintiff was committed to the custody of the Marshal of the King's Bench prison on the 4th of *November* 1797, regularly charged in execution upon a judgment at the suit of the defendant *Cunningham* for the sum of 776*l.* 18*s.* 5*d.*, and he remained so charged in execution until the 24th of the same month. During that time, viz. on the 15th of *November* 1797, a docket was struck against him by *Cunningham*, and a commission of bankrupt issued thereon on the 21st of *November* 1797, upon the petition of the defendant *Cunningham*, founded on the same debt for which the plaintiff was so charged in execution. The plaintiff at the time of such debt accruing and previous thereto was a trader within the meaning of the bankrupt laws, and had at the time when the docket was struck against him committed an act of bankruptcy.

This case was argued in *Michaelmas* term last by

Lawes for the plaintiff, who contended that after *Cunningham* had taken the plaintiff in execution for his debt, which amounted to a legal satisfaction of it, he could not sue out a commission of bankrupt against him for the same debt. The stat. 5 *Geo.* 2. c. 30. s. 23. which ascertains the amount necessary for a petitioning creditor's

A judgment creditor who has taken his debtor in execution cannot afterwards sue out a commission of bankrupt against him upon the same debt.

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 against
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 HAM.

ditor's *debt* extends only to legal debts, such as are capable of being enforced by a legal remedy, and does not include equitable debts. *Medlicott's case*, 2 *Stra.* 899. *Ex parte Hylliard*, 1 *Atk.* 147. 2 *Vez.* 407. *Ex parte Lee*, 1 *P. Wms.* 783. Now no action will lie for a debt after a party has been taken in execution. *Vigers v. Aldrich*, 4 *Burr.* 2482. *Jaques v. Witby*, *ante*, 1 vol. 557. *Clark v. Clements*, *ante*, 6 vol. 525. *Tanner v. Hague*, *ante*, 7 vol. 420. The taking of the person in execution is a satisfaction. *Chilton v. Wiffin*, 3 *Wils.* 13. and so was the death of a debtor taken in execution before the 21 *Jac.* 1. c. 24. *Hob.* 52. Now a commission of bankrupt is in the nature of a statute execution: it operates at once upon the person and property of the debtor. It may be admitted that if any other creditor sue out the commission after a judgment creditor has taken the debtor in execution, such judgment creditor has by the practice of the Court of Chancery an election either to sustain his execution or to come in under the commission: but that is founded upon this consideration, that as the commission sweeps away the whole of the debtor's property, it would be hard upon a judgment creditor to have the fruits of his judgment withdrawn from him without any default or act of his own. But that differs from the present case, where the creditor attempts by his own act to change the nature of his execution, and after having taken the person of his debtor wishes to get his property also. And *Barnaby's case* 1 *Stra.* 653. is expressly in point, that a creditor under such circumstances cannot sue out a commission of bankrupt. The only authority which can be opposed to this is *Burchall's case*, *Davis's Bankrupt Law* 15. which is not a book of much authority: but supposing the facts to be there truly stated, this was not the point before the Court, the question there being whether or not a scrivener were within the stat. 5 *G.* 2. Neither does it appear that in that case the party was in execution at the time when the commission issued.

Park, contra, relied on *Burchall's case* as in point, the authority of which (he observed) did not rest on the book referred to, but it was also to be found in 1 *Atk.* 143. And it is clear not only from the authority of *Davis* but from the nature of the case that *Burchall* must have been in execution at the time when the commission issued; for the petitioning creditor could not pending that commission have proceeded at law; notwithstanding which however the Lord Chancellor permitted him to relinquish his execution against the bankrupt and come in under the commission. Neither

does it appear from comparing the dates that there could have been time for the petitioning creditor to have taken *Burchall* in execution after the commission issued, because the proceedings on the commission commenced in *April* and the hearing of the petition was in *May*. The decision in this case which was in 1742 must be taken to have overruled *Burnaby's* case which was in 1725. Besides if the reason, on which that case proceeds, be true, it would equally apply to the case of any other as well as the petitioning creditor. But it is admitted that any other than the petitioning creditor may elect to come in under the commission, though he had before taken the bankrupt in execution for his debt, and thereby satisfied his demand as it is contended on the other side. And when this case was before the Lord Chancellor upon the bankrupt's petition, he laid great stress upon *Burchall's* case, and overruled *Burnaby's*.

After the argument on that occasion

Lord KENYON Ch. J. said, I have seen the whole proceedings in *Burnaby's* case, and it appears from thence that all the great men in court at that time, and amongst others Lord *Hardwicke* himself, had been engaged in the cause; so that the opinion of the Court was formed upon much consideration, and therefore the decision ought not to be lightly shaken. Even upon principle it seems to me to be an anomalous case that a creditor who has made his election to proceed against the body of his debtor should afterwards be able by his own act to change the nature of his execution and pursue his debtor's property; it is certainly contrary to the general rule of law. *Burchall's* case, it is true, was determined by a lawyer of the first eminence; but it is not clear to me how the fact there was. If *Burchall* were not in execution at the time when the commission issued, but was taken afterwards, (though it is extraordinary that one who had sued out a commission should have been suffered to proceed at law,) then the two cases may be reconciled.

ASHHURST J. I am very well satisfied with the determination in *Burnaby's* case; and perhaps *Burchall's* case may be found consistent with it upon the ground stated.

But *the Court* in deference to the opinion intimated by the Lord Chancellor when this matter was before him in another shape, ordered the case to stand over for a further argument.

And now

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ditor's *debt* extends only to legal debts, such as are capable of being enforced by a legal remedy, and does not include equitable debts. *Medlicott's case*, 2 *Stra.* 899. *Ex parte Hylliard*, 1 *Atk.* 147. 2 *Vez.* 407. *Ex parte Lee*, 1 *P. Wms.* 783. Now no action will lie for a debt after a party has been taken in execution. *Vigers v. Aldrich*, 4 *Burr.* 2482. *Jaques v. Withy*, ante, 1 vol. 557. *Clark v. Clements*, ante, 6 vol. 525. *Tanner v. Hague*, ante, 7 vol. 420. The taking of the person in execution is a satisfaction. *Chilton v. Wiffin*, 3 *Wils.* 13. and so was the death of a debtor taken in execution before the 21 *Jac.* 1. c. 24. *Hob.* 52. Now a commission of bankrupt is in the nature of a statute execution: it operates at once upon the person and property of the debtor. It may be admitted that if any other creditor sue out the commission after a judgment creditor has taken the debtor in execution, such judgment creditor has by the practice of the Court of Chancery an election either to sustain his execution or to come in under the commission: but that is founded upon this consideration, that as the commission sweeps away the whole of the debtor's property, it would be hard upon a judgment creditor to have the fruits of his judgment withdrawn from him without any default or act of his own. But that differs from the present case, where the creditor attempts by his own act to change the nature of his execution, and after having taken the person of his debtor wishes to get his property also. And *Barnaby's case* 1 *Stra.* 653. is expressly in point, that a creditor under such circumstances cannot sue out a commission of bankrupt. The only authority which can be opposed to this is *Burchall's case*, *Davis's Bankrupt Law* 15. which is not a book of much authority: but supposing the facts to be there truly stated, this was not the point before the Court, the question there being whether or not a scrivener were within the stat. 5 *G.* 2. Neither does it appear that in that case the party was in execution at the time when the commission issued.

Park, contra, relied on *Burchall's case* as in point, the authority of which (he observed) did not rest on the book referred to, but it was also to be found in 1 *Atk.* 143. And it is clear not only from the authority of *Davis* but from the nature of the case that *Burchall* must have been in execution at the time when the commission issued; for the petitioning creditor could not pending that commission have proceeded at law; notwithstanding which however the Lord Chancellor permitted him to relinquish his execution against the bankrupt and come in under the commission. Neither

does it appear from comparing the dates that there could have been time for the petitioning creditor to have taken *Burchall* in execution after the commission issued, because the proceedings on the commission commenced in *April* and the hearing of the petition was in *May*. The decision in this case which was in 1742 must be taken to have overruled *Burnaby's* case which was in 1725. Besides if the reason, on which that case proceeds, be true, it would equally apply to the case of any other as well as the petitioning creditor. But it is admitted that any other than the petitioning creditor may elect to come in under the commission, though he had before taken the bankrupt in execution for his debt, and thereby satisfied his demand as it is contended on the other side. And when this case was before the Lord Chancellor upon the bankrupt's petition, he laid great stress upon *Burchall's* case, and overruled *Burnaby's*.

After the argument on that occasion

Lord KENYON Ch. J. said, I have seen the whole proceedings in *Burnaby's* case, and it appears from thence that all the great men in court at that time, and amongst others Lord *Hardwicke* himself, had been engaged in the cause; so that the opinion of the Court was formed upon much consideration, and therefore the decision ought not to be lightly shaken. Even upon principle it seems to me to be an anomalous case that a creditor who has made his election to proceed against the body of his debtor should afterwards be able by his own act to change the nature of his execution and pursue his debtor's property; it is certainly contrary to the general rule of law. *Burchall's* case, it is true, was determined by a lawyer of the first eminence; but it is not clear to me how the fact there was. If *Burchall* were not in execution at the time when the commission issued, but was taken afterwards, (though it is extraordinary that one who had sued out a commission should have been suffered to proceed at law,) then the two cases may be reconciled.

ASHHURST J. I am very well satisfied with the determination in *Burnaby's* case; and perhaps *Burchall's* case may be found consistent with it upon the ground stated.

But *the Court* in deference to the opinion intimated by the Lord Chancellor when this matter was before him in another shape, ordered the case to stand over for a further argument.

And now

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Erskine was to have argued for the plaintiff; but it being understood that the defendants wished to leave the question upon the former argument for the opinion of the Court,

Lord KENYON Ch. J. said that the Court were perfectly satisfied with the propriety of the decision in *Burnaby's* case; and therefore directed

The *postea* to be delivered to the plaintiff.

Thursday,
Jan. 31st.

WALCOT against GOULDING.

After judgment for the plaintiff on demurrer, in debt on bond conditioned to pay an annuity, the defendant cannot take out execution for the arrears due, but must assign breaches on the record under the stat. 8 & 9 W. 3. c. 11. s. 3.

DEBT on bond for 5000*l.*, conditioned to pay an annuity of 250*l.* to the plaintiff during his life. The defendant pleaded that no memorial of the bond was inrolled, according to the stat. 17 Geo. 3. c. 26.; and on demurrer to that plea the plaintiff had judgment. The plaintiff signed final judgment, and took out execution for 204*l.* 10*s.*, without suggesting on the roll any breach of the condition: whereupon the defendant obtained a rule, calling on the plaintiff to shew cause why the judgment and execution should not be set aside, on the ground that the plaintiff ought to have suggested a breach on the roll, according to the stat. 8 & 9 W. 3. c. 11. s. 3; and the following cases were cited; *Collins v. Collins*, 2 Burr. 820; *Drage v. Brand*, 2 Wils. 377; *Goodwin v. Crowle*, Cowp. 357; *Roles v. Roswell*, ante, 5 vol. 538; and *Hardy v. Bern*, *Ib.* 540, and 636.

Erskine and *Bayley*, in shewing cause against that rule, now contended that the stat. 8 & 9 W. 3. was confined to cases where the bond is conditioned for performance of covenants in some other deed, or where there is a penalty to secure the doing of something on the non-performance of which the obligee would be entitled to recover uncertain damages. That statute was passed to relieve defendants, and to prevent their going into a Court of Equity to restrain a plaintiff from taking execution for the whole penalty where he was only entitled to unliquidated damages. But the Legislature did not mean that the act should extend to such a case as the present, where the condition is simply for the payment of a certain and precise sum of money, and where there is nothing on which the jury can exercise their judgment. The judgment for the whole penalty must stand as a security for the future arrears of the annuity, and execution may hereafter be taken out from time to time as such arrears shall accrue due. In

Howell v. Hanforth, 2 *Bl. Rep.* 1016. which was subsequent to the case of *Collins v. Collins*, where a bond had been given for the payment of an annuity, Lord Chief Justice *De Grey* and the whole Court said "where an annuity is secured by a bond, which becomes forfeited by any non-payment, the annuitant may sue the bond and levy the penalty, subject to the equitable interposition of the Court." So in *Ogilvie v. Foley*, 2 *Bl. Rep.* 1111., where the plaintiff sued out a *fi. fa.* to levy the whole penalty of the bond, which was conditioned for the payment of an annuity, the Court only ordered the overplus (beyond what would satisfy the arrears of the annuity) to be refunded, saying that the judgment should stand as a security with liberty to the plaintiff to take out execution as future arrears should arise.

But the Court (stopping *Gibbs* and *Lawes* who were to have argued in support of the rule) said that it was established by the case of *Collins v. Collins* that a bond conditioned for the payment of an annuity was within the stat. 8 & 9 *W. 3*; and that it was decided in the cases of *Hardy v. Bern*, and *Roles v. Roswell*, after great consideration, that in all cases within the provision of the statute 8 & 9 *W. 3.* the plaintiff must assign breaches on the record, that statute being compulsory on him. And therefore they made the

Rule absolute.

BENTLEY *against* DONNELLY and BENTON.

Friday,
Feb. 1st.

IN an action on the case for rescuing a debtor taken upon mesne process sued out of the Palace Court, the declaration stated that one *M. A.* on 9th December 1796 at *Westminster* in the county of *Middlesex* was indebted to the plaintiff in 20*l.* on a certain cause of action before then accrued to the plaintiff, and the said *M. A.* being so indebted the plaintiff for the recovery of his debt afterwards on the same day &c sued and caused to be issued out of the court of our lord the now King of his palace of *Westminster* holden at *Southwark* in the county of *Surry*, and within the jurisdiction of the said court, a writ of *capias ad respondendum* against the said *M. A.* directed to the bearers of the virge &c., commanding them to take the said *M. A.* if he should be found within the jurisdiction of the said court &c, so that they might

In case for rescuing a debtor taken upon mesne process sued out of the Palace Court, it was holden not to be sufficient ground for arresting the judgment after verdict that it was not alleged that the cause of action in the inferior court arose within the jurisdiction, or that it was not alleged

that the party below did not appear at the return of the writ.

have

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have his body before the Judges of the said court at the next court &c. on the 16th of *December* then next to be held at *Southwark* &c, to answer the plaintiff in a plea of trespass on the case &c.; which writ before the delivery to be executed was duly marked for bail against the said *M. A.* for 20*l.* according to the form of the statute &c.; and which writ was afterwards and before the return thereof viz. on the 13th of *December* 1796 at *Westminster* aforesaid in the said county of *Middlesex* delivered to one *F. P.* one of the bearers of the virge &c of the said court of the King of his palace of *Westminster* to be executed in due form of law; by virtue of which writ the said *F. P.* as such officer &c. afterwards and before the return of the said writ, to wit, on the day and year last aforesaid at *Westminster* aforesaid in the said county of *Middlesex* and within the jurisdiction of the court aforesaid arrested the said *M. A.* and detained him in his custody at the suit of the plaintiff for the cause aforesaid by virtue of the said writ and for want of bail thereto; that the defendants well knowing the premises, but contriving to injure the plaintiff and deprive him of the means of recovering his said debt whilst the said *M. A.* so remained in the custody of the said *F. P.* at the suit of the plaintiff and before the return of the said writ to wit on &c at *Westminster* aforesaid with force and arms wrongfully and unlawfully rescued the said *M. A.* from and out of the custody of the said *F. P.*, and set him at large &c, the plaintiff not being then nor yet satisfied of his said debt; by means whereof he has been delayed and prevented from recovering his said debt and his costs &c.

After verdict for the plaintiff, a motion was made in arrest of judgment in the last term; 1st, because it was not alleged that the cause of action arose within the jurisdiction of the Palace Court; 2dly, because it was not shewn that the party arrested did not appear at the return of the writ; for if he did so appear, the plaintiff sustained no damage; and *Noy* 72. was cited.

Mingay and *Lawes* now shewed cause against that rule. First, though it be necessary in every action in an inferior court to state that the cause of action arose within the jurisdiction, yet this being an action in this court against a stranger and wrong-doer, though grounded on the proceedings in the inferior court, it was not necessary to allege that the original cause of action accrued within the jurisdiction of that court, because the want of jurisdiction was matter of defence only to the defendant below and no

part of the plaintiff's cause of action. In *Lucking v. Denning* (a), which was an action against a serjeant at mace for the escape of one taken on process out of the sheriff's court of London, Holt Chief Justice said (to which the other Judges agreed) "That if a matter arise extra jurisdictionem, and the plaintiff declare of it as infra jurisdictionem, the defendant may plead to the jurisdiction of the court; but if he wave that and plead to the merits, he cannot take advantage of it, for by the averment of the count and his own admission he is estopped to say that the matter arose out of their jurisdiction. It is impossible the Court should know where a transitory matter arises unless the defendant acquaint them with it." But even admitting that without such an averment the plaintiff's title to recover is defectively set forth, yet that is cured by verdict and is no ground for arresting the judgment; for after verdict the Court will intend every thing to have been proved at the trial which was necessary to support the action, and amongst others that the cause arose within the jurisdiction. In the case of *Bull v. Steward* (b) it was holden that, in an action for an escape on mesne process out of an inferior court against the bailiff, the defendant could not take advantage of any error in the process below, of which the defendant below might have availed himself. And if that rule obtain in an action against an officer of the court, à fortiori it ought in an action against a stranger and wrong-doer. Secondly; though it is not stated that the defendant below did not appear at the return of the writ, yet it is alleged that by means whereof &c the plaintiff had been delayed and prevented recovering his debt; the want therefore of the former averment is cured by the latter, and by the finding of the jury that the plaintiff was damnified to such an amount. The case in *Noy* 72. was upon a plea in abatement.

Best contra. As to the first objection; it was holden in *Trevor v. Wall* (c) that the declaration in an action in an inferior court must allege that the cause of action arose within the jurisdiction, otherwise judgment will be reversed on error brought. It follows then that in this action founded on the supposition that the action below was legally brought, and that but for the wrongful act of the present defendant the plaintiff would have been entitled to the fruits of his action, it was necessary to allege all those circumstances material to the maintenance of the action, and amongst others principally that the cause of action arose within the jurif-

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(a) 1 Salk. 201.

(b) 1 Wilf. 255.

(c) Ante, 1 vol. 151.

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have his body before the Judges of the said court at the next court &c. on the 16th of *December* then next to be held at *Southwark* &c, to answer the plaintiff in a plea of trespass on the case &c.; which writ before the delivery to be executed was duly marked for bail against the said *M. A.* for 20*l.* according to the form of the statute &c.; and which writ was afterwards and before the return thereof viz. on the 13th of *December* 1796 at *Westminster* aforeaid in the said county of *Middlesex* delivered to one *F. P.* one of the bearers of the virge &c of the said court of the King of his palace of *Westminster* to be executed in due form of law; by virtue of which writ the said *F. P.* as such officer &c. afterwards and before the return of the said writ, to wit, on the day and year last aforeaid at *Westminster* aforeaid in the said county of *Middlesex* and within the jurisdiction of the court aforeaid arrested the said *M. A.* and detained him in his custody at the suit of the plaintiff for the cause aforeaid by virtue of the said writ and for want of bail thereto; that the defendants well knowing the premises, but contriving to injure the plaintiff and deprive him of the means of recovering his said debt whilst the said *M. A.* so remained in the custody of the said *F. P.* at the suit of the plaintiff and before the return of the said writ to wit on &c at *Westminster* aforeaid with force and arms wrongfully and unlawfully rescued the said *M. A.* from and out of the custody of the said *F. P.*, and set him at large &c, the plaintiff not being then nor yet satisfied of his said debt; by means whereof he has been delayed and prevented from recovering his said debt and his costs &c.

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(c) Ante, 1 vol. 151.

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dition. 5 *Com. Dig.* tit. *Pleader*, C. 22. "In rescous on a distress for rent the plaintiff ought to shew on what days the rent was payable." This is in order that the Court may see whether or not the distress were legally taken. The opinion therefore of Lord Chief Baron *Comyns* may be opposed to the cases cited. 2dly, It is not enough in an action on the case that the jury have found damage, but the plaintiff must shew in his declaration that he has sustained it. *Noy* 72. is in point to shew that it must appear in an action like the present that the defendant below did not appear at the return of the writ; for if he did appear the plaintiff was not damnified.

The Court desired to look into the authorities cited before they determined this case; and on the next day Lord *Kenyon* Ch. J. said, they had seen them, and thought they warranted the plaintiff's proposition, that it was not necessary in such an action as the present to state that the cause of action arose within the jurisdiction of the inferior court. That the case cited from *alk.* 201. would not alone have induced the Court to come to this conclusion: but that the case of *Bull v. Steward*, in 1 *Wils.* 255., was a direct authority in point. And therefore they

Discharged the rule (a).

(a) But see 1 *Roll. Abr.* 809. F. pl. 3; and 2 *Mod.* 197.Thursday,
Jan. 31st.

HARTLEY against HERRING.

In an action for consequential damage from slander imputing incontinence to the plaintiff, it is enough to state that he was employed to preach to a dissenting congregation at a certain licensed chapel situated at A., that he derived considerable profit

from his preaching, and that by reason of the scandal "persons frequenting the chapel had refused to permit him to preach there and had discontinued giving him the profits which they usually had and otherwise would have given," without saying who those persons were or by what authority they excluded him, or that he was a preacher duly qualified according to the 10 *Ann.* c. 2.

theless the defendant well knowing the premises but maliciously contriving and intending to deprive him thereof, and to bring him into disrepute and detestation among his neighbours and amongst the persons frequenting the said chapel, and to induce the said persons to prevent his preaching there or receiving any profit gain or emolument thereby on &c at &c scandalously &c spoke the following words &c, (setting out the scandalous words, which charged the plaintiff with incontinence,) per quod the plaintiff was injured in his good name &c, and was fallen into disgrace among his neighbours and with the persons frequenting the said chapel as aforesaid, insomuch that the said persons frequenting the said chapel by reason of the speaking &c have wholly refused to permit him to preach at the said chapel, and have withdrawn from him their countenance and support, and have discontinued giving him the gains and profits and emoluments which they had usually given and would otherwise have given; and that the plaintiff was in other respects greatly damnified and hindered from getting his livelihood, to wit, at &c.

Best moved in arrest of judgment in the last term, because words charging a person with incontinence are not actionable in the common law courts, unless special damage be laid; and here none is precisely laid, it not being stated who were the persons who in consequence of the slander discontinued giving the plaintiff the emoluments he had before received, or that there was any certain stipend annexed to the chapel, or that the persons who frequented had a right to remove him from it, or that he was a preacher duly qualified according to the 10 *Ann. c. 2.* And he cited 1 *Roll. Abr.* 58. C. 35. *Barnes v. Prudlin*, 1 *Sid.* 396, 7. and *Hunt v. Jones*, *Cro. Jac.* 499.

Marryat now shewed cause. The declaration alleges the special damage with as much certainty as the subject-matter is capable of. It states that the plaintiff before the speaking of the scandalous words was employed to preach to a dissenting congregation at a certain licensed chapel, (the locality of which is stated,) and that he derived considerable profit from his good character and preaching, and that by reason of the scandal of the defendant the persons frequenting the chapel had refused to permit him to preach there, and had discontinued giving him the profits which they usually had and would otherwise have given. It was impossible to state who the congregation were by name, because being a large fluctuating and uncertain body they cannot be known to the plaintiff

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plaintiff himself. The stating therefore where the chapel was, and the nature of the emolument which the plaintiff derived from his preaching, is stating as much as is necessary to enable the defendant to come prepared to meet the charge; and on this ground the cases cited are distinguishable from the present. 1 *Rol. Abr.* 58. was the case of slandering a brewer in his trade, by which he lost *his customers*, without stating any of them by name, which was holden ill: but there the plaintiff must have known who his customers were whom he had lost, and the defendant could not be enabled to defend himself without such notice. The case of *Barnes v. Prudlin* (a) was an action for slandering a single woman by saying she was with child and had miscarried, in consequence of which she lost *several suitors* &c: there also the suitors were necessarily within the plaintiff's knowledge, and the defendant without the like notice could not defend himself against the charge. The same answer applies to the case of *Hunt v. Jones* (b); where the plaintiff complained that having used the trade of baker whereby she maintained herself, and being desired in marriage by *many honest men*, she by reason of the defendant's calling her *whore* &c lost her marriage, and *divers* forbore to buy bread of her; on which judgment was arrested.

Best in support of the rule. The special damage is the gift of the action where the words themselves, as here, are not actionable, and therefore they must be laid with precision and proved as laid. *Bull. Ni. Pri.* 6, 7. No action lies for prevailing on another to withhold a voluntary donation, which is the utmost that is alleged in this case. It is not even stated that the plaintiff was a preacher, only that he occasionally preached, much less that he was duly qualified as required by the 10 *Ann. c. 2.* In *Hunt v. Jones*, before cited, where the plaintiff merely stated that she used the trade of a baker, it was holden not equivalent to an allegation that she was a common baker. At any rate upon the authority of the cases mentioned the plaintiff ought to have set forth by name the persons who had in consequence of the slander ceased to give him their donations, it not being alleged that this was a known office, having a certain salary annexed to it. At least it should have been averred that the persons frequenting the chapel had a right to exclude the plaintiff from preaching there, otherwise non constat that he was legally and properly removed.

(a) 1 *Sid.* 396. 1 *Ventr.* 4. S. C.(b) *Cro. Jac.* 493.

Lord KENYON Ch. J. I see no objection to this declaration. But in deciding the present case I wish not to shake the authority of any of the cases relied upon by the defendant, which are distinguishable from the present for the reasons given at the bar. Where a plaintiff brings an action for slander by which he lost his customers in trade, he ought in his declaration to state the names of those customers in order that the defendant may be enabled to meet the charge if it be false. But here the plaintiff was in possession of this office; and we are to conclude upon this record that he was properly licensed: but how could he have stated the names of all his congregation? He has stated that in consequence of the words spoken of him by the defendant, he was removed from his office, and lost the emoluments of it, which (I think) is sufficient.

The three other Judges expressing the same opinion, the
Rule was discharged.

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WAITE *against* SMITH and Another.

Friday,
Feb. 1st.

TO trespass for breaking and entering the plaintiff's close called the *Higher Butts* in the parish of *Barnoldswick* in the county of *York*, and pulling down gates there, the defendant pleaded first not guilty; and secondly, a special justification that at the time when &c there was a common King's highway in through and over the said close leading from *Barnoldswick* &c to *Thornton* &c in the said county &c, and because the gates in the declaration mentioned were erected across the said highway, which was thereby interrupted, the defendant pulled them down &c. The replication traversed the highway. At the trial before *Rooke J.* at the last assizes at *York* the jury found a verdict for the defendants, subject to the opinion of this Court on the following case.

At the time of committing the trespass the plaintiff was occupier of the close called the *Higher Butts* as tenant to Mr. *Bagshaw*. Previous to the year 1792 there was no common highway over the said close; and in that year the highway leading from *Barnoldswick* to *Thornton* in the said county was stopped up by the *Leeds* and *Liverpool* canal being cut across it, and a new road leading from *Barnoldswick* to *Thornton* was then made by the *Leeds* and *Liverpool* canal company across the said close called the *Higher Butts*, being then in the occupation of a different tenant, in the

That branch of the 19th clause of the 13 Geo. 3. c. 78. which directs that "when any highway hath been diverted above twelve months &c if a new highway hath been made in lieu thereof &c and the same hath been acquiesced in &c every such new highway shall from henceforth be the public highway" is retrospective only.

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plaintiff himself. The stating therefore where the chapel was, and the nature of the emolument which the plaintiff derived from his preaching, is stating as much as is necessary to enable the defendant to come prepared to meet the charge; and on this ground the cases cited are distinguishable from the present. 1 *Rol. Abr.* 58. was the case of slandering a brewer in his trade, by which he lost *his customers*, without stating any of them by name, which was holden ill: but there the plaintiff must have known who his customers were whom he had lost, and the defendant could not be enabled to defend himself without such notice. The case of *Barnes v. Prudlin* (a) was an action for slandering a single woman by saying she was with child and had miscarried, in consequence of which she lost *several suitors* &c: there also the suitors were necessarily within the plaintiff's knowledge, and the defendant without the like notice could not defend himself against the charge. The same answer applies to the case of *Hunt v. Jones* (b); where the plaintiff complained that having used the trade of baker whereby she maintained herself, and being desired in marriage by *many honest men*, she by reason of the defendant's calling her *whore* &c lost her marriage, and *divers* forbore to buy bread of her; on which judgment was arrested.

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TO trespass for breaking and entering the plaintiff's close called the *Higher Butts* in the parish of *Barnoldswick* in the county of *York*, and pulling down gates there, the defendant pleaded first not guilty; and secondly, a special justification that at the time when &c there was a common King's highway in through and over the said close leading from *Barnoldswick* &c to *Thornton* &c in the said county &c, and because the gates in the declaration mentioned were erected across the said highway, which was thereby interrupted, the defendant pulled them down &c. The replication traversed the highway. At the trial before *Rooke J.* at the last assizes at *York* the jury found a verdict for the defendants, subject to the opinion of this Court on the following case.

At the time of committing the trespass the plaintiff was occupier of the close called the *Higher Butts* as tenant to Mr. *Bagshaw*. Previous to the year 1792 there was no common highway over the said close; and in that year the highway leading from *Barnoldswick* to *Thornton* in the said county was stopped up by the *Leeds* and *Liverpool* canal being cut across it, and a new road leading from *Barnoldswick* to *Thornton* was then made by the *Leeds* and *Liverpool* canal company across the said close called the *Higher Butts*, being then in the occupation of a different tenant, in the

That branch of the 19th clause of the 13 Geo. 3. c. 78. which directs that "when any highway hath been diverted above twelve months &c if a new highway hath been made in lieu thereof &c and the same hath been acquiesced in &c every such new highway shall from henceforth be the public highway" is retrospective only.

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place of the highway so obstructed. The old road was so stopped up and the new road made by the canal company without any order or authority from any justices of the peace, and without applying for or obtaining the license of Mr. *Bagshaw* for that purpose. In *September* 1792 Mr. *Bagshaw* was in *Craven* where the roads lie, and then knew of the new road having been made. He left *Craven* a few days after and continued absent till 1794. No complaint was made to the canal company till 1794, when Mr. *Bagshaw* returned into *Craven*. No suit or prosecution was commenced within a year after the road was so diverted and turned. The new road has been used by the public in lieu of the old road from the time when the old road was so stopped up as aforesaid until the time of committing the trespass, and the new road is nearer and more commodious to the public than the old road. At the time when the trespass was committed, which was in the present year, the new road was stopped up by a gate and gate-posts set across it. The defendants entered into the close called the *Higher Butts* by order of the canal company to whom they were servants, and pulled down the gates and posts by which the road was obstructed as aforesaid.

The question is whether under the circumstances stated the new road made by the canal company over the close in question is or is not a public highway; and the verdict to be entered accordingly.

Scarlett for the plaintiff. The question turns on the construction of the statute 13 *Geo. 3. c. 78. s. 19.* which after providing that two or more justices of the peace may with the consent of the owner of the land divert any highway, so as to make it nearer or more commodious to the public, (which part of the clause is clearly prospective,) proceeds to direct that "where any highway &c hath been diverted or turned above twelve months, either from necessity where the same hath been destroyed by floods or slips of the ground on which it was made &c, if new highways have been made in lieu thereof nearer or more commodious to the public, and the same have been acquiesced in, and no suit or prosecution hath been commenced for the diverting or turning the same, every new highway &c set out and used in the place of that so diverted and turned shall from henceforth be the public highway." Now this part of the clause appears clearly to have been intended retrospectively only, whether the words be considered by themselves or with reference to the preceding and following words in the same and

and other clauses. In grammatical construction the words themselves, "*have been*," "*hath been*" &c, evidently relate to the past; and though these words are sometimes improperly used prospectively, yet the words "*from henceforth*" can only refer to the time of passing the act. If any future operation had been intended, the Legislature would have used the word "*thenceforth*." So by comparing this branch of the clause with what precedes and follows it, the same distinction will appear; for in the first part, which the Legislature meant should operate prospectively, the language is that "when it *shall* appear on the view of two justices that any public highway (not in the situation before described) *may* be diverted &c, and the owner of the lands &c *shall* consent thereto &c, it *shall and may be* lawful &c; and where any such highway &c *shall be* so ordered to be stopped &c it *shall and may be* lawful for any person aggrieved &c to appeal &c at the next general quarter sessions which *shall be* holden &c." Again in the latter part of the same section which provides for the repair of the new road, and which applies to both the preceding branches, the same distinction is preserved; "And all persons liable to the repair of any such old highways &c *so diverted and turned, or to be* diverted and turned, as aforesaid, shall in the same manner continue liable to the repair of such new highways" &c, thereby evidently meaning to include the retrospective and prospective provisions before made; which renders the whole consistent. Secondly, This construction is alone consistent with the general scope and view of the statute, which embraces three objects; 1st, That of widening highways to a certain breadth, or turning them where they were too narrow before; and this by *§. 16.* is compulsory on the owner; and if he cannot be found, or will not agree for a fair price, the value of the land taken is to be assessed by a jury under certain regulations and restrictions. 2dly, That of diverting highways to make them nearer or more commodious to the public; and this by the first branch of *§. 19.* is to be with the consent of the owner of the land taken. 3dly, To legalize roads which had been then used for twelve months preceding without any dispute. Now if this latter provision had been intended to have a future operation, it would have been in vain to have formed so many checks even to the widening of an old road, and amongst others requiring a compensation to be assessed by a jury even where the owner was unknown and of course where there could be no dispute with him, when by this sweeping regulation

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the road might be wholly turned over his ground, and that too without any compensation or remedy to him, provided the usurpation continued only twelve months. According to the construction contended for by the defendants, if a tenant by collusion suffered a public road to be carried over his landlord's grounds for twelve months the landlord would be bound for ever, though he had no notice of it, and though if he had received notice he could not prevent the road being used for more than a year if the tenant's term so long continued. But the Court will never presume that the Legislature intended that such a mischief should ensue, unless they had used clear and positive words to that effect; still less will they so decide contrary to the grammatical construction of the words used.

Holroyd contra. The branch of the 19th section alluded to was intended to have both a retrospective and a prospective operation, which accounts for the alteration of phrase from the former part which was prospective only. This being a remedial law, it ought to receive the most beneficial construction for the public convenience. The Legislature thought that if a road had been turned over a man's ground for above twelve months without any complaint on his part, it was a fair ground to presume that no injury was done to him, and that he had acquiesced in it. And this will not have the effect of converting every instance of usurpation into a right by a tenant's suffering the public to use a road over his landlord's ground; for the provision only relates to roads diverted or turned by public authority nearer or more commodious to the public than the old road, *and in lieu of it*. Neither is this provision inconsistent with the other provisions of the Legislature in the instances alluded to; for the powers given by the 16th section, which may be exercised against the consent of the owner, are expressly confined to the case where the old highway is too narrow and cannot be conveniently enlarged without diverting it. Nor can it be argued that the provision in question is too unjust or unreasonable to be exercised in future; for if so, there was the same reason for not making it retrospective. Then as to the words "from *henceforth*," on which the principal stress is laid, they are often used in acts of parliament to express that from henceforth the law shall be so and so; and in that sense it means here, that from henceforth where a public highway has been turned for above twelve months without any suit or prosecution commenced on that account, it shall remain a highway. But at
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any rate the trespass may be justified under the 34 Geo. 3. c. 74. s. 7. which, after altering some of the provisions of the 13 Geo. 3. c. 78., enacts "that all the clauses powers and provisions contained in the said act of the 13 G. 3. (except such as are hereby repealed or altered) shall continue in force in the same manner as if the same were repeated and re-enacted in the body of this present act, any thing therein contained to the contrary thereof in anywise notwithstanding." This is not worded according to the usual form of such clauses, that all the other provisions of the amended act not thereby altered or repealed shall remain in force as if the latter act had not been made, but as if they had been repeated and re-enacted therein. The effect of it therefore is to re-enact the clause in question; in which case, it being passed above twelve months after this road had been diverted, it will legalize it by the retrospective operation, which is admitted to belong to the same clause in the former act.

Scarlett in reply, as to the last argument; the legal effect of the last clause in the 34 Geo. 3. is to incorporate the new into the old law, and to prevent any repeal by implication of any other provisions than those expressly specified, but not to recommence the operation of the old law from the date of the new one further than the specific alterations required. This is clear from this consideration, that the new law provides expressly that the old law shall in all other respects than those expressly altered or repealed remain in force: whereas by the construction contended for the effect and operation of all the retrospective clauses in the old law would be altered, although not particularly specified, which would be against the express sense of the Legislature therein declared, and it would make that commence in 1794 which the Legislature declared by the 82d sect. of the former law should commence in 1773.

Lord KENYON Ch. J. I think there is no foundation whatever for the argument borrowed by the defendants' counsel from the last statute. The Legislature meant that the former law should only be altered in those instances that are particularly mentioned in the latter, but that as to all others it should continue in force. This case therefore must depend on the true construction of the general highway act, 13 Geo. 3. c. 78., of which that put upon it by the plaintiff's counsel is (I think) the true one. That a different construction would be productive of gross injustice is evident to every person who considers the subject; for if the defend-

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ant's construction were to prevail, in every case of a minority or of the absence of the owner, and even in other cases where the tenant chose to acquiesce in a new road being used or to collude with those who used it, the using of it for a twelvemonth would be conclusive evidence of the right against the owner of the land, though he had no means of preventing it by bringing an action of trespass, not being in possession. The fair construction is that insisted upon by the plaintiff: and without commenting minutely on all the words used in the different sections, I think that the word "henceforth" is not capable of receiving any other construction. If the words of the act were doubtful, and we were to consider which of the two constructions would work the least injustice, I should not hesitate to adopt the plaintiff's construction; still less then ought we to hesitate, when by adopting the defendants' construction we should violate all the rules of grammar. I am therefore most clearly of opinion that that part of the 19th section which the defendants' counsel principally relied upon is only retrospective. If any jobs had been done before the act passed, that act has certainly cured them: but the Legislature did not mean to give a sanction to any jobs in future.

GROSE J. (a) This appears to me to be a most vexatious attempt on the part of the defendants to injure the plaintiff's right of property: and on considering attentively the different words used in the sections of the act that have been pointed out, I am glad to find that it cannot be justified. The intention of the Legislature is perfectly clear; they meant to give power to justices in certain cases to divert roads in future, and to put an end to all further disputes respecting those that had been turned, even without authority, provided the new roads had been used and acquiesced in for a twelvemonth before. But there was no reason why those that should be diverted without authority after the act passed should be considered as legally diverted under the act, because whenever it should be thought by those who are competent to decide upon the subject that another road may be nearer or more commodious to the public, that act gives authority to two justices to divert it under certain circumstances. All the expressions in the different sections of the act are carefully used to express that intention, and to mark the difference between the future and the

(a) Mr. J. Ashurst was indisposed, and was not able to attend in his seat again until Monday the 9th of February.

past. And with regard to the other act of parliament alluded to, I am of the same opinion with the Lord Chief Justice.

LAWRENCE J. It is impossible to raise a doubt on the grammatical construction of the words used in the different clauses of the act; and I will not, for the purpose of working manifest injustice, read "thenceforth" for the word "henceforth."

Postea to the plaintiff.

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THOMPSON and Another *against* CHARNOCK.

Tuesday,
Feb. 5th.

THIS was an action of covenant on a charterparty, dated the 11th of *January* 1796, between the plaintiffs, the owner and master of the ship *Castor*, and the defendant, by which the plaintiffs let the ship to freight to the defendant for a voyage "from *London* to the *Cape of Good Hope* and *Bengal*, both or either of them, and back again to *London*." The principal question in this case arose on the construction of the charterparty, on demurrer to the third, fourth, and fifth pleas, the argument respecting which is here omitted, because it can be no precedent in future except in a case where the charterparty is like the present. But another question of more general concern arose on the sixth plea, to which the plaintiff also demurred. Sixthly; the defendant pleaded that by the 29th article of the charterparty it was agreed that, in case any difference should arise between the parties touching the agreement or any thing relating thereto, the same should be settled and adjusted by three arbitrators to be chosen &c; that the supposed breach of covenant in the declaration alleged arose upon and relates to the fifth article; and that though the defendant has been ready and willing and offered to refer the same to three persons so to be chosen &c the plaintiffs have altogether refused so to do.

To covenant in a deed (made for the performance of several matters) the defendant cannot plead that in the deed there is a covenant that in case any difference should arise between the parties respecting any part of the agreement it should be settled by three arbitrators to be chosen &c, and that he offered to refer the matter in dispute &c but that the plaintiff refused &c.

Giles, in support of the demurrer, relied on the case of *Mitchell v. Harris*, 2 *Vez.* jun. 129., where it was ruled that an agreement to refer cannot take away the jurisdiction of any Court in *Westminster*, and in which case all the former authorities were cited.

Wood contra. In *Kill v. Hollister* (a) it was said if there had been a reference depending, it might have been a bar to the action. Now here it appears that the defendant had done all in his power to refer the dispute to arbitration, and the plaintiff ought

(a) 1 *Wils.* 129.

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not to be permitted to take advantage of his own wrong in wilfully neglecting or refusing to name arbitrators. Again in *Wellington v. Mackintosh* (a) Lord Hardwicke, speaking of a covenant to refer, said "The parties might have made such an agreement as would have ousted this Court of jurisdiction." And in *Halfhide v. Fenning* (b) a plea (to a bill for a partnership account) that the parties had agreed to refer all matters in difference was allowed by the Master of the Rolls.

But *The Court* thought that this plea could not be supported.

Lord KENYON Ch. J. said, it is not necessary now to say how this point ought to be determined if it were *res integra*, it having been decided again and again that an agreement to refer all matters in difference to arbitration is not sufficient to oust the Courts of Law or Equity of their jurisdiction.

Judgment for the plaintiff (c).

(a) 2 Atk. 569.

(b) 2 Bro. Ch. Caf. 336.

(c) On the demurrer to the 3d, 4th, and

5th pleas, respecting the construction of the charterparty, as well as on the demurrer to the 6th plea.

Tuesday,
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ECKHARDT and Others against WILSON.

To assumpsit by several partners, the defendant may plead in bar the bankruptcy of one of them. — If partners by deed assign all their partnership effects &c to trustees for the benefit of their creditors, and some of the separate creditors of one partner do not assent to it, the assignment is fraudulent and void.

THIS was an action upon promises; to which the defendant pleaded, in bar, the bankruptcy of *A. G. Eckhardt*, one of the plaintiffs, and an assignment under it of all his debts and effects for the benefit of his creditors. The plaintiffs replied that, before the bankruptcy of the said *A. G. Eckhardt*, he with the other plaintiffs who were partners in trade by a deed of assignment, dated the 11th of *March* 1796, after reciting that they were indebted and were unable to discharge their debts and carry on their trade, assigned to certain trustees all their stock in trade debts and effects for the benefit of all their creditors who should execute the said deed, with a power of attorney to the trustees to sue for and recover debts &c; averring that the names of the plaintiffs were only used for and on behalf of the trustees, and to enable them to receive the debt due from the defendant to them under the said deed of assignment. To this the defendant rejoined that the bankrupt at the time of executing the said deed of assignment and his bankruptcy was indebted to several persons who did not execute that deed, that their debts are unpaid, and that they have sought relief under the commission of bankrupt issued against *A. G. Eckhardt*; wherefore the deed of assignment mentioned in the replication is void as to *A. G. Eckhardt's* share in the partnership

debts and effects, and the deed of assignment made under the commission of bankrupt is in full force &c. The plaintiffs demurred generally to this rejoinder.

Laws in support of the demurrer. First, The plea itself cannot be supported. The reasoning in the cases of *Fowler v. Dunn* (a) and *Webb v. Fox* (b), where it was holden that an uncertificated bankrupt might maintain trover for goods acquired by him after his bankruptcy, applies to the present case, and shews that this action may be supported by the four partners, notwithstanding the bankruptcy of one of them (his assignees not interfering). The same doctrine was also applied to two nisi prius cases, cited in *Webb v. Fox*, by the names of *Evans v. Brown* (c) and *Silk v. Ostorne* (d), which were actions of assumpsit. And they proceeded on this principle that the defendant is estopped by his contract with the bankrupt to dispute the right of the latter to sue. There is also another objection to the plea, that even if the defendant can be permitted to avail himself of the subject-matter of the plea, it should have been a plea in abatement not in bar. Secondly; at all events the rejoinder gives no answer to the replication. It was ruled in *Winch v. Keeley* (e) that the assignor of a chose in action, who is become a bankrupt, may sue the debtor for the benefit of the assignee. And if it be argued that the assignment is fraudulent, because the bankrupt partner (*A. G. Eckhardt*) had separate creditors who would not be entitled to come in under the assignment which was made for the benefit of the joint creditors, it may be answered that the assignment being of the partnership effects, the separate creditors of the bankrupt would not be entitled to any share of the joint stock, and therefore as against those separate creditors the deed is not fraudulent, and none of the joint creditors appear to have dissented from it.

Walton contra, after mentioning the case of *Marlar v. Kenworthy*, *H. 24 Geo. 3. B. R.* where it was decided that such a plea as the present was properly pleaded in bar, was stopped by

The Court, who said there was nothing in either of the objections. That the cases of *Webb v. Fox*, and *Fowler v. Dunn* proceeded on this ground, that an uncertificated bankrupt had a

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(a) *Bos. & Pul.* 44.

(b) *Ante*, 7 vol. 391.

(c) *Espin. N. P.* 140.

(d) *Espin. N. P.* 170.

(e) *Ante*, 1 vol. 619.

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special property in the goods in his possession subsequent to his bankruptcy, in respect of which he might maintain an action of trover. But that they could not govern the decision in the present case, which was an action on a contract, and that the bankrupt's right of suing to enforce that contract was vested in his assignees. That the plea was properly pleaded in bar, because it shewed not merely that there were other persons (namely, the assignees of the bankrupt partner) who ought to have sued with the plaintiffs but that one of the plaintiffs could not sue at all. That the rejoinder also was good, for that an assignment by deed by traders of all their effects, unless all their creditors concurred, was not only fraudulent and void as against those creditors who did not concur but was an act of bankruptcy. That whether the creditors who did not concur were joint or separate creditors was immaterial; for that the funds of the partners (bankrupts) were liable to all their creditors, first to the joint creditors, and afterwards the aliquot parts to the separate creditors of each.

Per Curiam,

Judgment for the defendant.

Wednesday,
Feb. 6th.The KING *against* WILLIAM and JOHN STEAD.

Upon an indictment for erecting a wall across a highway, not stating the nuisance to be continuing, there need not be judgment to abate it: Secus, where it is stated in the indictment as an existing nuisance.

THE indictment stated that from time whereof &c. there was and yet is a certain common and ancient pack and prime way leading from *A* to *B*. for all the King's subjects, and that the defendants on &c unlawfully erected a certain stone wall upon and across the same pack and prime way there leading through a certain wood called &c, whereby the said pack and prime way was totally obstructed and stopped up, to the great obstruction and delay of the King's subjects going and returning over and along the said highway and against the peace &c. On this indictment the defendants were found guilty at the General Quarter Sessions for the West Riding of the county of *York*, which Court afterwards at an adjourned Sessions directed a precept to the sheriff to abate the nuisance, and afterwards at the next General Sessions the same Court adjudged that the defendants for the said nuisance in the indictment mentioned be fined sixpence each, and be discharged. And now, upon a writ of error brought on that judgment, it was assigned for error that the Court below had not ordered by the said judgment *that the nuisance* whereof the defendants were in-

dicted and convicted *should be abated* as by law is required (a).
In support of which

France relied on the distinction taken in *Pappineau's* case (b), between permanent and transitory nuisances, between such things as are nuisances in themselves and such wherein the nuisance consists in the improper use to which lawful things may be applied. In the cases of transitory nuisances or such as arise from the improper use of any thing three of the judges thought that there should be no judgment to abate; it being improper (as they thought) to adjudge that a thing either non-existing at the time, or lawfully existing and only improperly used, should be pulled down; though the other Judge (*Fortescue*) thought that in all cases there should be judgment to abate the nuisance. But all the Judges seemed to consider that there should be judgment to abate that which is a nuisance per se, of a permanent nature. Now here erecting a wall across a highway must in the very nature of it be a nuisance per se, and therefore there should have been judgment to abate it. But it was thrown out as an objection on a former occasion that the indictment does not charge the nuisance to be *continuing*. That however does not appear to be necessary on referring to analogous proceedings on writs of assize of nuisance and quod permittat prosternere, as in *Co. Entr.* 92. *Lib. Vel. Intr.* tit. "Nuisance"; and *Rastall's Entr.* tit. *Nuisance*, p. 441.; where it appears to have been usual to give judgment of abatement, though it was not stated that the nuisance was continuing. The addition of these words, where the charge is for erecting and not merely for continuing the nuisance, is only made in aggravation. *Strickland v. Thorp* (c), and *Kendrick v. Bartland* (d). In all these cases it should appear on the record that the grievance complained of is fully redressed, which cannot be unless the judgment to abate the nuisance be added. In cases of convictions on indictments for non-repair of roads the Court will direct writs of *distringas* to issue from time to time till the sheriff return that the road is repaired, or what is now the usual course till there be a certificate of two justices to the same effect.

Lambe contra was stopped by the Court.

(a) This case was brought before the Court once before in another shape, when they intimated a strong opinion upon the point now in question. *R. v. The Justices of*

the West Riding of Yorkshire, ante, 7 vol. 468.

(b) 2 *Stra.* 686.

(c) *Cro. Jac.* 207.

(d) 2 *Mod.* 253.

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LORD KENYON Ch. J. When this case came before us on the former occasion, we intimated a strong opinion that the judgment given below was not erroneous, and I am now clearly of the same opinion. When a defendant is indicted for an existing nuisance, it is usual to state the nuisance and its continuance down to the time of taking the inquisition; it was so stated in *R. v. Pappineau*, "et adhuc existit;" and in such cases the judgment should be that the nuisance be abated. But in this case it does not appear in the indictment that the nuisance was then in existence, and it would be absurd to give judgment to abate a supposed nuisance which does not exist. If however the nuisance still continue, the defendant may be again indicted for continuing it. But if it be, it seems extraordinary that the prosecutor did not adopt the usual form of indictment. There is something of novelty indeed in another part of these proceedings; for it appears that before judgment was given at the Sessions a precept was issued to the sheriff in the nature of an execution: then afterwards a proper judgment was given adapted to the circumstances of the case. The defendants having erected a nuisance were fined by the Court; but as there was no existing nuisance, (for none such then appeared), of course no judgment was given to abate it.

GROSE J. of the same opinion.

LAWRENCE J. What was said by Mr. J. *Reynolds* in *R. v. Pappineau* is decisive, that "every judgment should be adapted to the nature of the case; where the erection is the nuisance, there ought to be a demolition;" that is, where the nuisance exists at the time of the judgment. But in this case the charge only is that the defendant at a time, which was past, had erected a wall across the highway, which was a nuisance: but to adjudge that a nuisance, which does not exist, should be abated would not be a judgment adapted to the nature of the case. With respect to proceedings on writs of affize of nuisance &c; those are cases in which from the nature of the proceedings the nuisance is supposed still to continue.

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Thursday,
Feb. 7th.MARTYN *against* KNOWLLYS.

THIS was an action on the case in the nature of waste. The declaration stated that the plaintiff was seised in his demesne of and in an undivided part of certain lands &c in *Wingfield, Berkshire*, the whole of which were in the occupation of the defendant who held and enjoyed the plaintiff's part as tenant to him (the plaintiff), yet that he (the defendant) wrongfully ploughed up &c divers acres of meadow &c, and wrongfully felled and destroyed divers timber and other trees &c. There were other counts, not stating that the defendant held the plaintiff's part as tenant to the plaintiff. The defendant pleaded the general issue.

On the trial at the last *Berkshire* assizes before Mr. J. *Heath* it appeared that the plaintiff and defendant were tenants in common of the land on which the trees grew; that the defendant occupied the whole, having a demise from the plaintiff of his moiety; and that he had felled many trees, all of which were of a proper age for being cut.

For the defendant it was objected that under these circumstances this action, for misfeasance, could not be supported; for that the case must be considered in the same light as if the plaintiff had not leased his moiety to the defendant, the trees as part of the inheritance not passing by that lease; and if so, that one tenant in common cannot bring such an action against another unless for some injury done to the inheritance, which was not pretended here, as all the trees were proper for being cut. That if the defendant could not cut trees in this state, one obstinate tenant in common might prevent the others taking the produce of the land. For the plaintiff it was contended that the defendant ceased to be tenant in common during the lease, and became liable to the plaintiff like any other lessee. But that even, if no lease had been granted by the plaintiff to the defendant, the former might maintain this action on the authority of *Moor* 71. pl. 194. and *Waterman v. Soper*, 1 *Ld. Raym.* 737; in the former of which it was holden "by *Dyer* and *Weston* that if there be two tenants in common of a wood, and one of them lease his part to the other who cuts trees and does waste, he shall be punished for a moiety of the waste, and the lessor shall recover a moiety of the place wasted;" and in the latter it was ruled by *Holt* Chief Justice, that "if there be two tenants in common of a tree, and one cut the whole tree, though

One tenant in common cannot maintain an action on the case in nature of waste against another tenant in common (in possession of the whole having a demise of the moiety from the first) for cutting down trees of a proper age and growth for being cut.

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the other cannot have an action for the tree, yet he may have an action for the special damage by this cutting; as where one tenant in common destroys the whole flight of pigeons." On the part of the defendant it was answered that in the two cases cited it was taken for granted that waste had been committed, which was not the case here; that in *Moor* it was stated that the lessee "cut trees and did waste"; and the instance put in Lord *Raymond* was the destruction of the whole flight of pigeons. The learned Judge however directed a verdict to be taken for the plaintiff for the value of half the trees, giving the defendant leave to move to set it aside and to enter a verdict for him, if this Court should be of opinion that the action could not be maintained.

This point was now discussed here on a motion to enter a verdict for the defendant, and the above cases were again referred to; and after argument the rule was made absolute.

Lord KENYON Ch. J. said, This verdict has neither principle or authority for its support. The defendant cannot be in a worse situation by being tenant to the plaintiff of his moiety than he would have been in if the plaintiff had not demised to him; and considered in that point of view, this action cannot be supported. This is an action ex delicto. If one tenant in common misuse that which he has in common with another, he is answerable to the other in an action as for misfeasance. But here it does not appear that the defendant committed any thing like waste: no injury was done to the inheritance; no timber was improperly felled; the defendant only cut those trees that were fit to be cut. And if he were liable in such an action as this, it would have the effect of enabling one tenant in common to prevent the others taking the fair profits of their estate. In another form of action the plaintiff will be entitled to recover a moiety of the value of the trees that were cut.

Rule absolute to enter a verdict for the defendant.

Erskine and *Manley* for the plaintiff.

Milles and *Abbott* for the defendant.

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DOE on the Demise of SMALL and Others against
ALLEN.Thursday,
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THE lessors of the plaintiff in this ejectment, which was brought for certain premises in *Shropshire*, claimed under *John Williams*, who being seised in fee by his will dated the 20th of *March* 1762 devised them to *W. Allen* by words which (the lessors of the plaintiff contended) passed only an estate for life; and who devised another estate to him for the term of thirty years. The testator had made a former will dated the 5th of *March* 1762, in which he had devised the premises in fee to *W. Allen*; from whom the defendant claimed. The testator died very soon after making his last will, leaving his sister *A. Small* his heir at law, who died leaving a son, under whom the lessors of the plaintiff claimed by devise. *W. Allen* the devisee under the will of *John Williams* held the estate devised to him for thirty years till the expiration of that term, and the premises in question till his death, which happened lately. At the trial before *Thompson* Baron at the last assizes for the county of *Salop* the due execution of the will of the 20th of *March* 1762 being proved, the defendant, who wished to set up the will of the 5th of *March* preceding, offered to call a witness to prove that she was in the room when the testator executed the will of the 20th of *March*, and that at the time of the execution the testator inquired *whether it was the same as the former*; and was told that *it was*. This evidence was objected to and the objection allowed, and there was a verdict for the plaintiff with liberty to the defendant to move for a new trial in case the evidence ought to have been received. A rule to shew cause having been accordingly obtained last term,

Gibbs and *Benyon* now shewed cause against it. It may be admitted that extrinsic evidence may be given to shew that a will was obtained by fraud: but parol evidence cannot be admitted to shew that the contents of the will are different from what the testator intended; for that would be to repeal the statute of Frauds (a). The admission of parol evidence of this kind would be opening a door to all those frauds and perjuries against which the statute was meant to provide. This is not like the case of substituting one

Parol evidence may be given of questions asked by the testator at the time of executing his will whether the contents were the same as those of a former will, to which he was answered in the affirmative, in order to set aside the latter will, on the ground of fraud.

(a) 29 Car. 2. c. 3.

1799.
 Doe dem.
 Small
 against
 Allen.

paper for another to be signed by a testator; for here there was no doubt but that he was apprised that the identical paper offered to him for his signature was intended to be his will, and he was as fully competent to understand the contents of it as any of the bystanders. The effect then of the evidence offered was to shew that he meant something different from what he knowingly signed. Upon the same ground evidence might be admitted to shew that a testator did not understand the terms which he made use of, but meant to convey his property differently from what they legally import; a circumstance which probably often happens; but no such evidence could be received by a court of justice. In *Selwin v. Browne* (a) parol evidence of a testator's instructions to his attorney in making his will, of an intention to release a bond debt to one of two executors whom by his will he made tenants in common of the residuum of his estate, was holden inadmissible by the House of Lords.

Erskine, Leycester, and *Manley* contra were stopped by the Court, having first mentioned *Gosse v. Tracy*, 2 Vern. 699. and 8 Vin. Abr. 167.

LORD KENYON Ch. J. I think that this evidence ought to have been received. The testator having made one will, which (is admitted) was a good will, and being pressed by certain persons around him to make another will, asked in the presence of credible witnesses whether or not the second will which was brought to him to be executed were the same as the first, which was answered in the affirmative. It turns out that it was different from the first will, and the question here is whether or not that evidence ought to be received. Our decision will not in the least tend to repeal the statute of Frauds, or contradict the case of *Selwin v. Browne*. I agree that the contents of a will are not to be explained by parol evidence: but, notwithstanding that act, evidence may be given to shew that a will was obtained by fraud. And the effect of the evidence offered in this case was to shew that one paper was obtruded on the testator for another which he intended to execute.

GROSE J. It seemed to be admitted at the bar that evidence may be given to shew that one paper was substituted for another; and that I think is sufficient to decide this case. For the evidence proposed to be given was this, that when the testator asked for a

(a) *Cas temp. Talbot* 240. 4 Bro. P. C. 179. 186.

duplicate of his former will the persons about him substituted another instead of it.

LAWRENCE J. declared himself of the same opinion.

Rule absolute.

1799.

Do^r dem.
SMALL
against
ALLEN.

BARNARD *against* VAUGHAN and Another.

Thursday,
Feb. 7th.

IN an action of trespass tried at the last assizes at *Winchester* before Lord Chief Justice *Eyre*, the only question was whether or not the plaintiff had committed an act of bankruptcy before the trespass committed; as to which the facts were these. The plaintiff had two houses, one at *Houghton* in *Hampshire*, the other at *Richmond* in *Surry*. On the 30th of *October* 1797 she went away from the former, (and never returned to it) leaving a person in possession. On the 22d of *November* in the same year she left her house at *Richmond*, (to which she never afterwards returned,) having previously put a man in possession with directions not to let any person in. On the 24th of the same month a sheriff's officer went there to levy under a writ of *fieri facias* against the plaintiff's goods, but the person in possession refused to let him in, saying he knew the object of his coming. On the part of the plaintiff it was insisted that this was not an act of bankruptcy within the meaning of the statute 1 *Jac.* 1. c. 15. s. 2. (a), because no creditor was delayed by the absence of Mrs. *Barnard*, and that in the construction of this act it has been holden (b), that in order to constitute an act of bankruptcy it is necessary that the intention of the debtor to delay his creditor and an actual delay should both concur. Whereas here, whatever intention the plaintiff might have had to delay her creditors, no creditor was in fact delayed, this execution being in *rem* and not in *personam*. A verdict however was taken for the defendants, with liberty to the plaintiff to move to set it aside, and to enter a verdict for her, if this Court should be of opinion that no act of bankruptcy had been proved.

In order to constitute an act of bankruptcy by departing from the dwelling-house a creditor must be delayed: and it is not sufficient (for that purpose) that a sheriff's officer, who comes to levy a *fi. fa.* on the trader's effects, is refused admittance after the trader has left his house.

A rule for this purpose was accordingly obtained in the last term, and now the same point was again agitated. But

(a) Which enacts that whoever shall depart the realm, or begin to keep his house or otherwise to absent himself, &c. or depart from his dwelling-house, or make any fraudulent grant of his lands or goods, to the

intent or whereby his creditors may be defeated or delayed for the recovery of their just debts &c, shall be adjudged a bankrupt.

(b) *Fowler v. Padget*, ante, 7 vol. 509.

1799.

DOE dem.
SMALL
against
ALLEN.

paper for another to be signed by a testator; for here there was no doubt but that he was apprised that the identical paper offered to him for his signature was intended to be his will, and he was as fully competent to understand the contents of it as any of the bystanders. The effect then of the evidence offered was to shew that he meant something different from what he knowingly signed. Upon the same ground evidence might be admitted to shew that a testator did not understand the terms which he made use of, but meant to convey his property differently from what they legally import; a circumstance which probably often happens; but no such evidence could be received by a court of justice. In *Selwin v. Browne* (a) parol evidence of a testator's instructions to his attorney in making his will, of an intention to release a bond debt to one of two executors whom by his will he made tenants in common of the residuum of his estate, was holden inadmissible by the House of Lords.

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1799.

DOE dem.
SMALL
against
ALLEN.

BARNARD *against* VAUGHAN and Another.

Thursday,
Feb. 7th.

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(b) *Fowler v. Padget*, ante, 7 vol. 509.

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BARNARD
against
VAUGHAN.

The Court were clearly of opinion that no act of bankruptcy had been proved; for that, as far as respected the execution of the writ of fieri facias, the plaintiff's absence from home was perfectly immaterial. That no creditor had been delayed in this case; and that an actual delay was as necessary as the intent to delay in order to constitute an act of bankruptcy. And therefore the

Rule was made absolute.

Thursday,
Feb. 7th.

BARNES *against* HOLLOWAY.

A count for
slandrous
words spoken
affirmatively
is not sup-
ported by
proof that
they were
spoken by
way of inter-
rogatory.

IN an action on the case for slander the declaration stated that the plaintiff was a farmer and possessed certain lands and tenements in *A.* lately given to him by his father, and which were not mortgaged, and that the defendant maliciously spoke these words, "*he* (the plaintiff) *cannot pay his labourers,*" by reason of which one *E. C.* who had contracted to sell to the plaintiff fifty bushels of clover seed had refused further to deal with him, and also the said *E. C.* and one *R. P.* to whom the plaintiff was then indebted demanded of the plaintiff to pay them sooner than they otherwise would have done. The evidence was that the defendant had asked a witness "if he had heard *Barnes* could not pay his labourers?" A verdict was found for the plaintiff at the last *Winchester* assizes, with liberty for the defendant to enter a nonsuit if this Court should be of opinion that the evidence did not support the count. A rule nisi for that purpose having been obtained last term,

Gibbs, on shewing cause, said that the meaning of the words proved was the same as those laid, though expressed in the form of an interrogatory. The defendant's intention was to affirm the slander positively. But

Per Curiam, There is a manifest distinction in these cases between the same idea conveyed by words spoken affirmatively, and put interrogatorily. And whatever the party may mean, the words must be proved as they are laid.

Rule absolute.

Dallas and *Burrough* were to have supported the rule.

1799.

Thursday,
Feb. 7th.SYMONDS *against* BALL and Two Others.

REPLEVIN for taking the plaintiff's cattle at a common land called *Hay*. Avowry that the plea in question has been immemorially parcel of a customary tenement of the borough of *Launceston* &c, of which *Frost* was seised in fee according to the custom of the borough, and because the plaintiff's cattle were doing damage there the defendants seised them as a distress &c.

Plea in bar that by stat. 34 G. 3. (reciting that there were within the borough of *Launceston* common lands called *Hay*, the aftermath of which had immemorially belonged to the mayor aldermen and free burghesses of the borough for depasturing cattle from the time of the crops of grass and corn being removed to the 12th of *January* in every year, but for want of proper regulations the said pasturage produced very little benefit,) it was enacted that all the aftermath should be vested in the mayor and aldermen for the time being in trust nevertheless to sell and dispose thereof, or otherwise to lease or demise the same by writing to any person &c. for the best price or rent that could be had for the same; that by virtue of the said act on the 3d of *October* 1797 the mayor and aldermen of the borough by their certain writing sold and disposed of the aftermath of the common lands called *Hay* to the plaintiff from thenceforth until the 12th of *January* then next for 38 l., being the best price that could be had for the same, by virtue of which selling and disposing the plaintiff became entitled to the aftermath from thence until the 12th of *January*; and being so entitled he put in his cattle &c until the defendants unjustly took and detained them &c.

Replication that the mayor and aldermen did not sell and dispose of the aftermath to the plaintiff modo et forma &c, on which issue was joined.

There was another plea in bar, that the mayor and aldermen by their certain writing demised the aftermath to the plaintiff, on which issue was afterwards taken.

At the trial at the last assizes in *Cornwall* before GROSE Justice, it appeared that an auction was holden according to a previous advertisement for the purpose of disposing of the aftermath, when written conditions of sale were produced, and the plaintiff being the highest bidder, the town clerk of the borough, who acted as agent for the mayor and aldermen, wrote down his name as the

An allegation in a plea, that "A. by his writing sold the aftermath of land to B.," is not proved by evidence that at an auction held for the purpose of selling it B. was the purchaser, that B. gave a promissory note for the sum, and that B.'s name was written (by A.'s agent) in the printed catalogue as the buyer.

purchaser

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 SYMONDS
 against
 BALL.

purchaser at 38 l.; and the plaintiff then gave his promissory note for the 38 l.

It was objected that this was not a sale or demise in writing, as required by the act of parliament and the pleas in bar, and the learned Judge was of that opinion; but a verdict was taken for the plaintiff with liberty to the defendants to move to set it aside and to enter a verdict for them if this Court should be of opinion that the plaintiff had not proved his pleas in bar.

Such a rule having been obtained in the last term,

Gibbs and *Dampier* now shewed cause against it; contending that this was a sale and demise in writing, the town clerk having signed the agreement on the part of the corporation, and the plaintiff having on his part given a note in writing for the purchase-money. And they referred to the case of *Simon v. Metivier*, Bull. N. P. 280., where it was ruled that the entry by an auctioneer of the defendant's name and the price of a lot in a printed catalogue at an auction with the defendant's consent was "an agreement in writing, signed by the agent of the party", within the statute of Frauds. But

The Court (without hearing *Bond*, *Jekyll*, and *Gaselee*, contra) were clearly of opinion, that the plaintiff had not established his pleas in bar; saying that as neither the memorandum made by the town clerk or the note given by the plaintiff could be deemed a sale or demise in writing, so neither could they be joined together for that purpose. And they made the

Rule absolute.

Thursday,
 Feb. 7th.

DONATTY against BARCLAY..

An action on a bail-bond must be carried on in the court where the original action was brought.

THE defendant, on being arrested for a debt of 10 l. on process out of the Palace Court, gave a bail-bond to this plaintiff (an officer of that court) in 20 l. The bail-bond having been forfeited, the plaintiff put it in force in the court below, and the defendant removed the cause into this court by habeas corpus cum causa; on which

Lawes obtained a rule here, calling on the defendant to shew cause why a writ of procedendo should not issue to the writ of habeas corpus, on the ground that the action on the bail-bond ought to be carried on in the same court where the original action was begun; and he referred to *Dixon v. Heslop*, ante, 6 vol. 365.

Conste, who now shewed cause against that rule, said that this case was distinguishable from that cited, because there the action was brought by the assignee of the bail-bond, whereas this was brought by the officer to whom it was given. But

The Court said that that was immaterial; for that the foundation of the decision in the case referred to, as well as in several other cases (a) on the same point, was that the action on the bail-bond ought to be brought in the same court where the original action was commenced, in order that the Court may under the statute of *Ann* (b), give in a summary manner "such relief to the plaintiff, the defendant, and to the bail, as is agreeable to justice." And that the same rule of decision had been applied to a case arising in the county palatine of *Chester* (c). Therefore they made the

Rule absolute.

(a) Vid. *Francis v. Taylor*, *Barnes*, 92. 4th edition; *Chesterton v. Middlehurst*, 1 *Burr.* 642; *Walton v. Bent*, 3 *Burr.* 1923; *Morris v. Rees*, 3 *Wils.* 348, and 2 *Bl. Rep.* 838.

(b) By stat. 4 *Ann.* c. 16. s. 20. it is enacted that if any person shall be arrested by writ bill or process issuing out of any of her Majesty's courts of record at *Westminster* &c the sheriff or other officer shall assign the bail-bond &c to the plaintiff &c; and if the said bail-bond be forfeited the plaintiff may bring an action thereon in his own name, "and the court where the action is brought

may by rule of the same court give such relief to the plaintiff and defendant in the original action and to the bail upon the said bond &c, as is agreeable to justice and reason &c," and such rule shall have the effect of a defeazance to such bail-bond &c. But by sect. 24. it is provided that that act and all the statutes of *Jeofails* "shall extend to all courts of record in the counties palatine of *Lancaster* *Chester* and *Durham* and the principality of *Wales*, and to all other courts of record within this kingdom."

(c) See *Chesterton v. Middlehurst*, 1 *Burr.* 642.

PARIS *against* WILKINSON.

Thursday,
Feb. 7th.

THE defendant gave the plaintiff a warrant of attorney, empowering him to enter up judgment in an action of debt on bond for 4150*l.* but the plaintiff entered up judgment for that sum in an action of debt on a *mutuatus*, on which execution was taken out.

Gibbs now moved to set aside the judgment and execution, on the ground that the judgment was not warranted by the power of attorney under which it was entered up.

Garrow opposed this in the first instance; contending that as it was the intention of both the parties that a judgment should be entered up for the sum of 4150*l.*, and as the plaintiff had not exceeded that authority, the words "on bond" might be rejected, and then the present judgment might be supported. And that the

If plaintiff enter up judgment in debt on a *mutuatus*, on a warrant of attorney "to enter up judgment in debt on bond," the Court will set it aside as irregular.

1799.

PARIS
against
WILKINSON.

Court need have no difficulty in so deciding, it being evident that the form of proceedings was not in the contemplation of the parties when the warrant of attorney was given.

The Court were inclined to give the plaintiff leave to amend, by entering up a judgment of this date: but that would not answer his purpose, the defendant having become a bankrupt. But they said that they could not reject the words proposed; and as the judgment was irregular,

The rule was made absolute.

Friday,
Feb. 8th.

BOEHM and Others *against* BELL.

Captors of ships seized as prize may insure their interest therein, and are not entitled to a return of premium although it be afterwards adjudged to be no prize and restitution be awarded to the owners by the Court of Admiralty.

THIS was an action for money had and received brought by the plaintiffs, as agents and insurance-brokers of the Hon. *W. Elphinstone* and *J. Jackson*, who are the agents in *England* of *C. Brisbane* late commander of his Majesty's frigate *L'Oiseau*, *W. Durban* late commander of his Majesty's frigate the *Saldanha*, and *D. O. Guion* late commander of his Majesty's ship *Vindictive*, to recover 94*l.* 19*s.* 2*d.* being part of the premium of 105*l.* paid to the defendant as an underwriter for 500*l.* upon the policy of insurance hereinafter stated. The defendant pleaded the general issue. At the trial of this cause before Lord *Kenyon* at the Sittings at Guildhall after last *Michaelmas* term the Jury found a verdict for the plaintiffs for 94*l.* 19*s.* 2*d.*, subject to the opinion of this Court on the following case.

On the 30th of *January* 1797 the above-mentioned Captains *Brisbane*, *Durban*, and *Guion*, having taken the ship *Westcapelle* and her cargo as prize off the *Cape of Good Hope*, then bound upon a voyage from *Batavia* to *Boston*, put her under the command of Lieutenant *Macdougall* of the *L'Oiseau* as prize-master, and sent a letter to Messrs. *Elphinstone* and *Jackson* mentioning the capture of the *Westcapelle*, formerly a *Dutch East India* ship but then navigated under *American* colours from *Batavia* by the name of the *George* of *Boston* manned with a crew above two-thirds *Dutch*, which they supposed a lawful prize; and stating that as there was no Court of Admiralty there they were under the necessity of sending her to *England* for trial, and advising an insurance on the ship and cargo of 40,000*l.* from all risk during her passage to *England*. By the same letter it appeared that the estimated value of the prize was 150,000*l.* Messrs. *Elphinstone* and *Jackson* in consequence of such orders directed the plaintiffs to cause the said ship and cargo

to be insured to the extent of 40,000*l.*, and accordingly the plaintiffs on the 22d of *April* 1797 effected a policy upon the ship and goods "at and from the *Cape of Good Hope* to *London* valued at 150,000*l.* being on ship and cargo; this insurance being effected by order and for account of the Hon. *W. Elphinstone* and *J. Jackson* Esq. agents for the captors at a premium of 20 guineas *per cent.* to return 8*l. per cent.* if departs from the *Cape* or *St. Helena* with convoy for *England* and arrives." The defendant subscribed the policy for 500*l.* and received the premium, being 105*l.* The plaintiffs and Messrs. *Elphinstone* and *Jackson* effected other policies on the same ship and cargo for the homeward risk to the extent in the whole of 48,000*l.* at the same premium; and after the ship's arrival in the *Thames* they effected other policies with the public insurance offices against river risks, one at the rate of 10*s. per cent.*, another at 15*s.*, and two others at 1*l. per cent.* premium. The ship after her capture sailed with her cargo under the command of Lieutenant *Macdougall* as prize-master from the *Cape of Good Hope* with convoy for *St. Helena*, where she arrived and remained in safety for one month; she sailed from thence for *England* without convoy and arrived in safety in the *Thames* on the 7th of *August* 1797. The ship and cargo were at the instance of the captors libelled as prize in the usual manner in the Court of Admiralty as belonging to subjects of *Holland* enemies of the King of *Great Britain*, but on the 30th of *August* 1797 a claim was there made and entered by *W. Burges* on behalf of *Theodore Lyman George Williams* and Company and *Samuel Gardner*, all of *Boston* in the State of *Massachusetts*, and *Clifford Crowninshield* the master and *Henry Smith* and Messrs. *Brown* and *Francis* of *Providence County* in the State of *Rhode Island* and *Providence Plantation* merchants, and respectively citizens of *America*, as the true and lawful owners and proprietors of the ship *Westcapelle* and cargo, also on behalf of the officers and crew of the ship, and of *Jonathan Dennison* for his private adventure; and on the 17th of *March* 1798 the following sentence was pronounced thereupon; "The Judge having heard further informations and advocates and proctors on both sides thereon at the petition of *Slade* admitted the claim for the ship and cargo (except such part thereof as is claimed as the property of *Huibright Maarbys* the chief mate); and by interlocutory decree pronounced the said ship and cargo (except as aforesaid) to have belonged as claimed, and decreed the same to be restored to the claimant for the use of the owners and pro-

1799.

BOEHM
against
BELL.By the same
letter it ap-
peared that
the estimated
value of the
prize was
150,000*l.*

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BOEHM
against
BELL.

proprietors thereof; and by further interlocutory decree pronounced the goods claimed on behalf of *H. Maarbys* to have belonged at the time of the capture and seizure thereof to an enemy of the crown of *Great Britain*, and as such or otherwise subject and liable to confiscation, and condemned the same as good and lawful prize taken by his Majesty's ship of war *L'Oiseau C. Brisbane* commander in company with his Majesty's ship of war *Vindictive D. O. Guion* commander and *Saldanha W. Durban* commander, and rejected *Slade's* prayer as to reserving the consideration of damages subsequent to the capture." The ship and cargo have been since restored to the claimants, and have been sold by them; the former producing about 1500*l.* and the latter about 60,000*l.* The goods of *H. Maarbys* condemned by the sentence have been since also sold by the proper officer of the Court of Admiralty, and after deducting the expences of sale have produced the sum of 1014*l.*, the invoice price thereof being about 300*l.* No fraud is imputable either to the plaintiffs or to the captors of the ship and cargo respecting the insurance in question. On the 1st of *November* 1798 the plaintiffs demanded from the defendant and other underwriters 18*l.* 19*s.* 10*d.* per cent. as a return of the proportion of the premium paid by the plaintiffs to the defendant upon the policy in respect of the ship and such part of the cargo as has been decreed to be restored by the above sentence, and for this demand the present action is brought.

Park for the plaintiffs. The assured are entitled to a proportionable return of premium, on the ground that the consideration on which it was paid to the underwriter has failed; the insurance having been made on the supposition that the property insured was lawful prize and the property of the captors, which turns out in the event to be without foundation, except as to about a fortieth part. In *Tyré v. Fletcher* (a) Lord Mansfield said "A policy of insurance is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the insured, and to whatever cause it be owing, if he do not run the risk, the consideration for which the premium was paid fails, and therefore he ought to return it." This rule applies in every day's practice in policies with short interest, as where 20 hogshheads of sugar are insured, and only 10 are shipped; in which case there is always a proportionable return of premium; or if none be shipped, the whole is returned. So here the Court of Ad-

(a) *Corp.* 668.

miralty having in effect determined that the captors had no property on board (with the trifling exception above noticed), the underwriters run no risk but in that respect, and therefore cannot in conscience hold the entire premium. It is true that captors and even agents of prize have been holden (a) to have such an expectation of interest therein as that they may insure it. But that is founded upon the supposition that the subject-matter is lawful prize, though till condemnation the property is not vested in them. Here too the subject-matter was *Dutch* prize, and the stat. 37 Geo. 3. c. 109. §. 1. only vests the property of *Dutch* prize in the captors *after* condemnation; so that in the event it appears that they never could have recovered upon this policy. No deception was practised on the underwriter; and he himself knew that unless the ship and cargo were lawful prize no property could vest in the captors. If the ship had been lost in the voyage by any peril insured against, the underwriter would not have been liable to the whole extent of the policy; but might have shewn that it was no prize and so the captors not interested. For though the proceedings of the Court of Admiralty are, generally speaking, in rem, yet it being necessary for the ends of justice they would have entertained jurisdiction upon the question of prize or no prize. Besides, the captors might have libelled in that court for their head-money, in which case that question would necessarily have come in judgment. The owners also might have sued in that court for a restitution in costs and damages for any loss which their property had been subjected to by the unwarranted seizure of the captors. If however it be urged that that itself was a risk against which the captors had a right to indemnify themselves, the answer is, that the unlawful act of the captors themselves was not one of the risks insured; besides, the Admiralty Court having rejected the prayer of the owners for reserving the consideration of damages subsequent to the capture have in effect adjudged that there was reasonable ground for the detention of the ship by the captors, and consequently they run no risk on that account, as appears by the judgment of that Court. Indeed by the course of proceeding there costs and damages are never awarded against the captors after a sentence of restitution, unless they appear to have been guilty of some misconduct or gross negligence in making the capture or in their subsequent conduct of the prize. Then it will be

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BELL.(a) *Le Gras v. Hughes*, B. R. E. 22 Geo. 3. *Park's Insur.* 307.

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urged that this being a *valued* policy, and some part being ap-
judge prize, namely, to the extent of 1014*l.* out of 40,000*l.*
insured, to which extent at least a risk was incurred by the under-
writers, there can be no apportionment of the premium. But this
proceeds on mistaking the nature of valued policies. They do not
import that the parties are to be bound to the extent of the sum
insured at all events, whether he have any interest in the subject-
matter or not, but only that the assured shall not be obliged to
prove minutely the value of his property: still however it must
bear some proportion to the sum insured. This doctrine was
fully recognized by Lord *Mansfield* in *Lewis v. Rucker* (a), who
concludes with saying; "It is settled that upon valued policies the
merchant need only prove some interest to take it out of the 19 G. 2.
c. 37.; because the adverse party has admitted the value; and if
more were required the agreed valuation would signify nothing.
But if it should come out in proof that a man had insured 2000*l.*
and had interest on board to the value of a cable only, there
never has been, and I believe never will be, a determination that
by such an evasion the act of parliament may be defeated." Lord
Kenyon inclined to the same opinion in *Flint v. Le Mesurier* at
Guildhall (b), where the quantum of the interest of the assured
was finally agreed to be referred. The only cases of this kind
where underwriters have been suffered to retain the whole pre-
mium have been when the insurance was fraudulently made be-
yond the value of the interest in order to cheat them. But here
fraud is negatived; and the parties acted altogether under a
mistake. This being a new case, if there be any doubt, it ought
to be decided in favor of the assured on the ruling principle
of insurance law, that such policies are mere contracts of indemnity
up to the extent of the risk really incurred.

Giles contra. The assured are not entitled to a return of any
part of the premium, because the policy did attach, the risk was
incurred, and consequently the consideration of the premium has
not failed. The defendant is entitled to retain it on three grounds;
1st, The assured had an insurable interest to the amount of the
sum insured, and in the event of a loss might have recovered
against the underwriter. There is a fallacy in the plaintiff's argu-
ment that, because the ship was not ultimately condemned as prize,
the captors had nothing to insure; which fallacy arises from not
distinguishing between an insurable interest and an absolute in-

(a) 2 Burr. 1167.

(b) Vid. *Park's Insur.* 3d edition.

defeasible property. But it is clear the one may exist without the other, as was holden in *Le Gras v. Hughes* and *Flint v. Le Mesurier*. Here the assured had the possession of the thing insured, together with a contingent interest in the event of it's being condemned. They had also an immediate interest in the subject-matter arising out of their responsibility for the care and safety of the ship; it being admitted that in case of gross negligence or misconduct the Admiralty Court would adjudge a compensation to the owners in costs and damages. *Le Caux v. Eden*, Dougl. 594. Now if in any event the underwriters might have been answerable, it follows that there can be no return of premium. The expectation of an interest in this case was no more uncertain than the profits of a consignee of goods (a) or of an agent of prize, who may insure their expected profits; and yet in the one case the consignor may stop the goods in transitu, and in the other it may turn out to be no lawful prize. At any rate the captors might insure, considered as trustees for the owners in the event of the property not being condemned as prize, according to what was said by Mr. J. Grose in *Craufurd v. Hunter* (b). But 2dly, the extent of the interest of the assured is immaterial in this case, because this is a valued policy, wherein the parties have agreed on the amount of the interest insured. This having been done bonâ fide is conclusive between them. The very intention of such a policy is to prevent all dispute about the value; it is a part of the contract itself; and nothing can impeach it but fraud, which is here negatived. In *Thellusson v. Fletcher* (c) it was holden that on a writ of inquiry in an action on a valued policy no other proof of interest was necessary than the policy itself. It is admitted that it would conclude any question of difference to a small extent of value; then where can the line be drawn? If this action can be maintained, it will encourage frauds; for the assured will always insure beyond the true value in order to take the chance of recovering more in case of a loss; while on the other hand if the ship arrives safe they, who alone know the real value, may recover back a proportionable part of the premium beyond what was really risked. In *Montgomery v. Eggington* (d) the assured on a valued policy on freight was holden entitled to recover the whole amount, though only part of the goods were on board at the time of the

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(a) Vid. *Grant v. Parkinson*, B. R. M.
22 Geo. 3. *Park's Insur.* 305.

(b) *Ante*, 24.

(c) Dougl. 314.

(d) *Ante*, 3 vol. 362.

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loss; which establishes the distinction between open and valued policies. And this is recognized by the Legislature in the 35 G. 3. c. 63. §. 10. imposing stamps on sea-insurances, where there is a proviso that, in case the sums insured on homeward-bound voyages exceed the interest of the assured to a certain amount, the commissioners shall make an allowance of the stamp-duties on the excess, with an exception in case of *valued* policies. 3dly, At any rate as this was an insurance on a foreign ship, it was not necessary that the assured should have any interest at all, it not being within the stat. 19 Geo. 2. c. 37.; as was holden in *Craufurd v. Hunter* (a). Therefore on either of these grounds the plaintiff is not entitled to a return of premium.

Park, in reply, said that in all cases whether of valued or open policies the assured must prove an interest; and in the former the policy is but *prima facie* evidence of the extent of it. That the case of *Montgomery v. Eggington* proceeded on the ground that, the insurance on the freight being entire, the ship-owner had a right to insure the whole of his expected gain as soon as the ship had begun to earn her freight. And that the case of *Craufurd v. Hunter* did not apply, that being an express insurance on *Dutch* property on board *Dutch* ships: whereas this was insured as *English* property, become such by capture; and therefore it was necessary by the stat. 19 Geo. 2. c. 37. to prove an interest in the assured.

LORD KENYON Ch. J. Although this is a case of great value, and new in specie, I am inclined to give my opinion on it now, it being a case of considerable expectation and of little difficulty. At the trial of this cause I adopted an opinion unfavorable to the plaintiff's claim: before I left the court indeed I began to doubt whether I had not formed my opinion too hastily; I therefore postponed coming to any conclusion until I had heard the case argued: but now having had great assistance from the counsel on both sides, and having considered the case more attentively than almost any other that ever came before me, I confess that the first impressions which the case made upon my mind have not been removed. I will not enter into a discussion of either of the two last points made by the defendant's counsel, because the first alone furnishes, in my opinion, an answer to this action. And I am the more strongly fortified in that opinion by considering what has not been as well as what has been urged by the counsel in reply; for it is observable that the plaintiff's counsel did not even

(a) *Ante*, 24.

attempt to give any answer to the first point made by the defendant, as if conscious that it was unanswerable. The real question in this case is one of the most simple that can be stated; it is merely this, whether the assured had or had not any interest. This ship was captured by the captains of the ships mentioned in the case, who were acting in the service of their country, and on whose conduct there is not the smallest imputation; they had the possession of the property insured, and from that possession certain rights and duties resulted. If it were a legal capture the captors were entitled; if the capture were improperly made, they were liable to be called to an account in the Court of Admiralty, where they might be amerced in damages and costs. They had therefore a right to insure themselves against the decision that might have loaded them with damages and costs. It was important to them to take care that there should be something forthcoming to answer for the amount of those damages. On this short ground therefore I am clearly of opinion that the assured had an insurable interest, that the risk was begun, and that there can be no return of premium.

GROSE J. This is a claim by the plaintiffs for a return of premium on the ground that the assured had no insurable interest in the property. But it would be opening a source of infinite litigation if we were to decide that this action could be maintained, and that a portion of the premium ought to be returned in the event of its appearing that the assured had not an interest up to the extent of the insurance. Three answers have been given to this case by the defendant's counsel: of the two last I shall only say that they are important, and will deserve much consideration when it becomes necessary to decide on them; but here it is not necessary to give an opinion upon either of them. With regard to the first, it seems to me that the whole difficulty has arisen from confounding an absolute indefeasible interest with an insurable interest. It is not pretended that the assured had the absolute property in the subject of insurance; neither need they have such property to make the policy legal; it is sufficient if they had an insurable interest. And according to what was said by Lord *Mansfield* in the case of *Le Gras v. Hughes* they certainly had an insurable interest. If they had succeeded in the Court of Admiralty, it will be admitted that they had an insurable interest: and in case of their not succeeding there, there were events in which they might be made answerable, and against which it was competent to them to insure.

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I am therefore satisfied that they had an insurable interest in the subject insured; and this is a full answer to the present action.

LAWRENCE J. The case turns on this short question, whether or not the assured had an interest which they might insure? Did they mean to game? or was not there a loss against which they might indemnify themselves by a policy of insurance? I do not mean a certain, but a possible, loss. Now it has been shewn that this was a case in which the Court of Admiralty might have decreed them to pay damages and costs, and that is sufficient. It might be asked, in the language of Lord Mansfield in *Le Cras v. Hughes*, "had not the insured such an interest in the ship coming home as to entitle them to an indemnity?" I think that they had, and therefore that the plaintiffs are not entitled to a return of premium.

Postea to the defendant.

Friday,
Feb. 8th.

SANDERS against KENTISH and HAWKSLEY.

The plaintiff being possessed of 3000 l. 4 per cent. stock empowered defendant to sell the same for his own benefit, in consideration of which the defendant agreed to transfer at the next opening 3000 l. 4 per cent. into the plaintiff's name; held that this was not a case prohibited by 7 Geo. 2. c. 8. s. 8. but that on failure of the defendant's engagement the plaintiff might maintain an action against him to recover the value of that stock on the day appointed for the transfer.

THIS was an action of assumpsit for not transferring 3000 l. 4 per cents. into the plaintiff's name at the opening day in April 1795. On the trial at the sittings after last term before Lord Kenyon a verdict was found for the plaintiff for 2820 l., subject to the opinion of this Court on the following case.

On the 1st of December 1794 the plaintiff, being possessed of the sum of 3000 l. 4 per cent. annuities, executed to the defendant *Kentish* a letter of attorney, empowering him to sell the same and to apply the produce for his own benefit; in consideration of which *Kentish* and the defendant *Hawksley* as a surety for *Kentish* signed an engagement or undertaking, whereby they engaged "on the opening of the 4 per cents. consols to transfer 3000 l. 4 per cent. annuities in the name of the plaintiff in lieu of the same sum sold by him on account of *Kentish*." On the 3d of December 1794 the defendant *Kentish*, by virtue of the letter of attorney, sold and transferred the said stock to three different persons for 2516 l. 5 s., which he received for his own use. No stock has been transferred to the plaintiff according to the above agreement. The defendants at the time of making the agreement to transfer the stock as aforesaid were not, nor was either of them, possessed of or entitled to in their or either of their own name or names or in the name or names of a trustee or trustees to their or either of their use of any such stock as is in the contract or agreement mentioned, or any 4 per cent. annuities whatsoever. The question is whether

whether the plaintiff is prevented from recovering by the statute 7 Geo. 2. c. 8. s. 8. (a).

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Bayley for the plaintiff. The contract of the defendant to replace the stock which he had borrowed of the plaintiff is not within the act of parliament. The object and title of the act are *to prevent the infamous practice of stock-jobbing*; which is a species of gambling by making pretended contracts for the sale or purchase of stock at certain periods, without any stock being really sold or transferred or intended to be so between the parties, but the difference of the value of the stock at the respective periods of sale and repurchase is paid by the first buyer or seller according to the fluctuations of the market in the mean time. Now nothing of that kind was in contemplation in this case; it was not the object of the defendant to speculate, nor of the plaintiff to benefit himself but only to make a *bonâ fidê* loan of the stock. The preamble of the 8th section states the mischief intended to be prevented to consist in persons *selling and disposing* of stock or other securities *of which they are not possessed*. Now this was not a sale but a loan of the stock *of which the plaintiff was possessed*. Though it is a contract for *transferring* stock, which is one of the words used in the enacting part, yet that evidently means a *transfer upon a sale*, and not upon a loan, and by one who is not possessed of the stock. And though the word *or* be used in the beginning of the clause, as if to distinguish between "buying, selling, assigning, *or* transferring," stock, yet the word *and* is immediately afterwards used to couple the same words, and to shew that

(a) Sect. 8. "And whereas it is a frequent and mischievous practice for persons to sell and dispose of stocks or other securities, of which they are not possessed; be it enacted that all contracts and agreements whatsoever, made and entered into for the buying selling assigning or transferring of any public or joint stock or stocks or other public securities whatsoever, or of any part share or interest therein, whereof the person or persons contracting or agreeing, or on whose behalf the contract or agreement shall be made, to sell assign and transfer the same, shall not at the time of making such contract or agreement be actually possessed of or entitled unto in his her or their own right, or in his her or their own name or names, or in the name or names of a trustee or trustees to their use, shall be null and void to all intents and purposes whatsoever." &c.

Sect. 11. "Provided that nothing in this act contained shall extend or be construed to extend to hinder or prevent any person or persons from lending any sum or sums of money on any public or joint stock or other public securities whatsoever, or any part share or interest therein, or to prevent or hinder any defeazance contract or agreement being made and entered into for the redelivering assigning or transferring of such public or joint stock or other public securities, or any part share or interest therein, upon the repayment of the sum or sums of money which shall have been lent and borrowed thereupon, with interest for the same, so as no premium or other consideration whatsoever be paid to or received by the person or persons lending such money for or in consideration of such loan more than legal interest."

they

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they were intended to be used in the same sense. Besides, the defendant after the transfer of the stock to him became a trustee of so much stock for the benefit of the plaintiff; and therefore the contract would be legal by the very words of the same clause. But at all events this case falls within the exception of the 11th section, whereby it is enacted that the former provisions shall not extend to prevent any contract for the redelivering assigning or transferring of such public stock upon the repayment of the money borrowed thereon. In *Tate v. Wellings* (a) under similar circumstances this objection was not taken, though the case was much considered; and there Lord *Kenyon* treated it as a loan and not as a sale of stock.

Wood contra. It is true the first object of the act was to provide against stock-jobbing properly so called, against which the first provisions are directed: but that was not the only object; for the act was meant to extend to cases like the present, which though they might sometimes be intended bonâ fidê, yet (the Legislature were apprehensive) would be made a cover for stock-jobbing. It is not unusual for the enacting clause to extend beyond the terms of the mischief recited; and here the 8th section does expressly prohibit contracts for transferring of stock by persons who were not possessed of it at the time, which applies to the situation of the defendant in this case. This transaction is also contrary to the spirit of the act; for the Legislature, having specifically excepted certain cases from the operation of the general words, must be taken to have intended to exclude all other exceptions. Now the 11th section only extends to the case of a mortgage of stock, where money is lent upon any public stock; in that case it provides that the act shall not extend to prevent any agreement for the redelivering, assigning, or transferring, of such public stock upon the repayment of the money lent and borrowed thereon. This therefore does not apply to a case where the stock has been actually sold and the money paid to the borrower, who undertakes without having any stock in possession to replace a certain quantity at a given time. And besides there is a stipulation in the same clause that no more than legal interest shall be paid on such loan: whereas here the lender might gain considerable advantage in case of the rise of stock in the meantime beyond the legal interest. It is in effect a mere wager, the quantum of which depends on the fluctuation of the price of the stock. This question did not arise

(a) *Ante*, 3 vol. 531.

on the state of the pleadings in *Tate v. Wellings* (a); the only question there was on the statute of usury. It is no answer in such a case that there was no intention in the parties to break the law; if they have in effect done so, they must abide the consequences.

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Lord KENYON Ch. J. It is impossible to read this case without feeling great indignation at the conduct of the defendant *Kentish*. The case is shortly this; the defendant *Kentish*, who is a stock-broker, and who was therefore most probably acquainted with the statute on which his counsel has now relied, applied to the plaintiff, a clergyman, who was probably ignorant of that law, and obtained from him a loan of 3000 *l.* stock, on an undertaking to replace the same stock on a given day; from this transaction the plaintiff was to derive no advantage whatever; the plaintiff gave him a letter of attorney empowering him to sell the stock; he then put the money into his pocket, and when the day of payment arrived refused to pay the plaintiff, insisting that the statute of *Geo. 2.* rendered the contract void, and that therefore the plaintiff cannot enforce that contract in a court of law. To be sure if such were the positive provisions of that statute, the consequence must follow however hard it might press upon the plaintiff. But before we assented to so monstrous a proposition we would look with eagle's eyes into every part of the statute to see that such was the intention of the Legislature. Their intention is to be collected from the whole act taken together. The act is intitled "An act to prevent the infamous practice of stock-jobbing": but if the defendant's objection were to prevail, the title of the act ought to be altered, and it should run thus, "An act to encourage the wickedness of stock-jobbers, and to give them the exclusive privilege of cheating the rest of mankind." On considering the whole of the act together I am clearly of opinion that its object was only to prevent gambling in the funds; but the Legislature did not mean to prohibit a loan of stock and an undertaking to replace it. I do not think that this case comes within the meaning of the prohibitory clauses in the act, but it is within the exception in the last section.

GROSE J. and LAWRENCE J. of the same opinion.

Postea to the plaintiff.

(a) *Ante*, 3 vol. 531.

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Friday,
Feb. 8th.CASSERES *against* BELL.

In a plea of alienage the defendant must state that the plaintiff was born in a foreign country at enmity with this country, and that he came here without letters of safe conduct from our King.

TO an action on a policy of assurance the defendant pleaded several pleas, and among the rest the two following. And for a further plea &c. "that the said *Samuel Van Jofias* (the plaintiff) is an alien born in foreign parts, to wit, at *Holland* out of the allegiance of our lord the King, and under the allegiance of a foreign state, to wit, of the republic of *Holland*, to wit, at *London* afore said in the parish and ward afore said; and the said defendant further says that long before and at the time of exhibiting the bill of the said plaintiff the persons exercising the powers of government in *Holland* were and still are at open war with and the enemies of our said lord the King, to wit, at *London* afore said in the parish and ward afore said, and this he is ready to verify; wherefore he prays judgment if the said plaintiff ought to have his afore said action thereof maintained against him" &c. And for a further plea &c. "that the plaintiff is an alien born in foreign parts, to wit, in the *French Netherlands*, out of the allegiance of our lord the King and under the allegiance of a foreign state, to wit, of the *French King* &c; that long before and at the time of exhibiting the plaintiff's bill the persons exercising the powers of government of *France* were and still are at open war with and the enemies of our lord the King to wit at &c.

To these two pleas the plaintiff demurred generally.

Giles in support of the demurrer. The two pleas of the defendant cannot be supported, because they do not shew that the plaintiff is in such a situation that he cannot bring a personal action. They should have stated that the plaintiff is an enemy of our King: his having been born out of the King's allegiance does not incapacitate him from suing here, even though the government to which he owes a natural allegiance is at war with this country. An alien friend may bring a personal action in this country. *Watford v. Masbam*, *Moor* 431. If these pleas were sufficient to deprive the plaintiff of his right of suing, most of the foreigners in this country would be equally incapable of suing, though residing here under letters of safe conduct from our King. The pleas should have negatived the plaintiff's residing here under letters of safe conduct. In *Openheimer v. Levi* (a) it was expressly

(a) 2 Str. 1082.

ruled

ruled that it was necessary in such a plea to state that the plaintiff is an alien enemy; and that resolution is conformable with all the precedents.

Wood contra. In such a plea as the present it is sufficient to state that the plaintiff owes allegiance to a state or sovereign that is at enmity with our King. In *Raft. Ent.* 605. there is a precedent of a plea which states that the plaintiff was born in a foreign state at enmity with our King, without adding that he was an alien enemy (a). And in *Tbel. Dig. lib. 1. f. 17* and 18, there are similar precedents. Here it is stated in the first of these pleas that the plaintiff was born in *Holland* out of the allegiance of our King and that the persons exercising the powers of government in *Holland* are at open war with and the enemies of our King, which is sufficient. The same is stated in the other plea, only substituting *France* for *Holland*. If the plaintiff have any letters of safe conduct from our King, that may be replied by the plaintiff: but is not necessary to negative that in the defendant's pleas. It was not negated in the case of *Brandon v. Nesbitt*, ante, 6 vol. 23.

LORD KENYON Ch. J. After consulting the authorities on this subject, I am of opinion that these pleas cannot be supported. There is a precedent of a plea of this kind in *Derrier v. Arnaud*, reported in 4 *Mod.* 405, the original record of which we have examined. And according to that it seems that as this is an odious plea, the defendant must state every thing that can oust the plaintiff of his right of suing. It is there stated that the plaintiff was born in *France*, of foreign parents, and that he came into this kingdom without letters of safe conduct &c; negating every presumption that could arise in favor of the plaintiff's right to sue. When I first read this case it occurred to me that, on principle, it was not necessary to negative all these facts in the defendant's plea: but the case in 4 *Mod.* and that cited from Sir J. *Strange* have removed my doubts; they shew that the plaintiff is not driven to reply any of these facts, for that the defendant must negative them in his plea.

LAWRENCE J. There is another case, in 1 *Ld. Raym.* 282. *Wells v. Williams*, which shews that it is necessary for a defendant, who pleads that the plaintiff is an alien enemy, to set forth all those facts in his plea that negative the plaintiff's right of suing here.

Judgment for the plaintiff.

(a) But it does negative the plaintiff's having letters of safe conduct.

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Friday,
Feb. 8th.DEAN *against* NEWHALL.

If the obligee of a bond covenant not to sue one of two joint and several obligors, and if he do that the deed of covenant may be pleaded in bar, he may still sue the other obligor.

TO debt on bond for 200*l.*, the defendant (after craving oyer of the bond, which appeared to be a joint and several bond executed by the defendant and one *C. Taylor*, conditioned for the payment of 100*l.* to the plaintiff on the 23d of *March* 1796,) pleaded that while the bond remained in force and before the exhibiting of the plaintiff's bill, to wit, on the 1st of *October* 1796 by a certain indenture made between the said *C. Taylor* of the first part, certain other persons whose names were thereto subscribed and seals affixed of the second part, and *T. Fenna* and *C. Buckley* of the third part, the plaintiff for the considerations therein contained released and discharged *C. Taylor* from this writing obligatory and of and from any debt or sum of money due and owing to the plaintiff from *C. Taylor* thereon. The plaintiff replied that he did not release *C. Taylor* modo et formâ, on which issue was joined.

At the trial at the last *Chester* assizes the case appeared to be thus. The defendant had become surety for *Taylor* to the plaintiff in the bond for 200*l.* *Taylor*, becoming insolvent, by the deed of the 1st of *October* 1796, assigned over all his effects to *Fenna* and *Buckley* in trust for themselves and all the other creditors who should execute the deed. The plaintiff, one of the creditors, executed the deed, and received a dividend under it of 48*l.* In the deed was contained a covenant by the creditors that "they would not sue arrest implead or prosecute *Taylor* his executors or administrators or his or their goods &c for or on account of any debt &c, and in case any of the said creditors should sue &c those presents should be a sufficient release and discharge to all intents and purposes both at law and in equity to and for the said *C. Taylor* his executors &c, and he and they should be and were thereby acquitted released and discharged against them the said creditors &c, and as such should and might be pleaded in bar by him the said *C. Taylor* &c."

It was contended by the plaintiff that, as the bond on which the action was brought was joint and several, this deed was not a release even as to *Taylor* and could not be pleaded as such, though as between the plaintiff and *Taylor* it might operate and have the effect of a release if *Taylor* only had become bound; and that, though the issue in form was whether or not the plaintiff had released *Taylor*, the real question to be decided was whether

or not he had released the defendant. To this it was answered on the part of the defendant that the only issue on the record was whether or not the plaintiff had released *Taylor*; as to which it was insisted that the covenant in the deed of assignment must be taken to be a release. The plaintiff was nonsuited, with liberty to him to move to set aside the nonsuit and to enter a verdict for him if this Court should be of opinion that he was entitled to a verdict.

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DEAN
against
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Leycester obtained a rule in the last term, calling on the defendant to shew cause why the nonsuit should not be set aside and a verdict entered for the plaintiff; against which

Wigley now shewed cause. The only question before the Court is whether or not the plaintiff released *Taylor*; that is the issue joined, and if the plaintiff had thought the matter alleged in the plea, immaterial he should not have taken issue on it. On referring to the authorities on this subject it will be found that the plea is in substance good, because a release to one of two joint and several obligors is a release to both. *Co. Lit.* 232. a; *Everard v. Herne*, *Lit. Rep.* 191; 18 *Vin. Abr.* "Release," G. a. pl. 1; 4; 5; *Scot v. Littleton*, 1 *Keb.* 936. So in *Lacy v. Kynaston* (a) it was holden that "where a covenant is joint and several, a release to one of the covenantors is a release to all." And in *Clayton v. Kynaston* (b), the Court held that where two are jointly and severally bound a release to one discharges the other. If the obligee make one of two co-obligors executor and leave assets, the debt is satisfied. *Fryer v. Gildridge*, *Hob.* 10., and *Moor* 855. And though in *Denys v. Payne*, as reported in *March* 95, it was said that where an obligee sued one of two joint and several obligors and entered a retraxit against him it was only in the nature of an estoppel, of which the other should not take advantage; yet as reported in *Sir W. Jon.* 451. it was said that *on that question* no opinion was given; and according to the report of the same case in *Cro. Car.* 551, *Croke J.* says merely that "*he inclined to be of that opinion.*" And in *Parker v. Sir J. Lawrence*, *Hob.* 70. it was holden that a nonsuit, noli prosequi, or release, or other discharge of one defendant discharges the rest. The ground of this application is that the deed of 1796 only contained a covenant not to sue *Taylor*, and therefore cannot be considered as a release: but it amounts to more than a covenant not to sue, for it is expressly covenanted that if any of the creditors should sue the deed should be a suf-

(a) 1 *Ld. Raym.* 690.(b) *Salk.* 574.

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sufficient release, and as such might be pleaded in bar by *Taylor*. In 1 *Rol. Abr.* 939. L. 2. it is said if the obligee covenant not to sue the obligor before such a day, and if he do that the obligor shall plead this as an acquittance and that the obligation shall be void and of none effect, this is a suspension of the debt, and by consequence a release. And this doctrine was recognized by *Buller J.* in *Smith v. Mapleback*, ante, 1 vol. 446. In *Ayliff v. Scrimshire* (a), where the defendant pleaded to debt on bond a letter of license to go abroad for seven years and a covenant by the plaintiff not to sue, and if he did that the defendant should be discharged and released of the debt, the Court held that it was no defeazance but only a covenant not to sue within a particular time, but that if it had been a covenant perpetual it would have been an absolute release. The same distinction was also taken in *Deux v. Jefferies*, *Cro. Eliz.* 352. So in *Carvell executor v. Edwards* (b) in debt on a judgment the defendant pleaded an assignment, to which the plaintiff's testator the defendant and his creditors were parties, by which the defendant assigned over his house &c to be sold for the benefit of his creditors, who upon receipt of their proportions were to give a release of all matters &c, and who agreed that until the house was sold they would not sue the defendant under penalty of forfeiting their debts, it was holden that this was a defeazance and might be pleaded in bar. Now in this case the words of the deed are stronger than those, the covenant being that if any of the creditors should sue *Taylor* the deed should be a release to all intents and purposes both at law and in equity and as such might be pleaded in bar.

Leycester contra. The foundation of the defendant's argument is that the deed of assignment executed in 1796 was a release to *Taylor*, and therefore it was a release also to the defendant. But the fallacy of the argument consists in treating this as a release, and in confounding this which is only a constructive release, arising out of a covenant not to sue, with a formal and absolute release. It may be admitted that if the plaintiff had formally released *Taylor*, he would also thereby have released the defendant. And therefore the plaintiff was obliged to take issue on the defendant's plea; for if he had demurred, it would have been considered as a formal and technical release to *Taylor*, and consequently binding on the plaintiff. But this is not a release to *Taylor*; it only operates quâ a

(a) 1 *Show.* 46.

(b) 1 *Show.* 330; *Carth.* 210; *Holt's Rep.* 541.

release. If *Taylor* himself had been sued, he could not have pleaded that the plaintiff had *released* him, though he might have pleaded this deed in bar, which, as between those parties, would have operated quā a release; but even that is only permitted in order to avoid a circuitry of action: but where the obligee enters into a covenant not to sue one of two joint and several obligors, the covenant cannot be pleaded in bar to an action on the bond. All the cases cited by the defendant (except that of *Lacy v. Kynaston*) may be divided into two classes; 1st, those, where the obligee has actually released one of several obligors, and there certainly it is a release to all the obligors; 2dly, those where the obligee has covenanted with a sole obligor not to sue, and there to prevent a circuitry of action the covenant may be pleaded quā a release to an action on the bond. But in *Fitzgerald v. Trant*, 11 *Mod.* 254., and *Lacy v. Kynaston*, *Holt's Rep.* 178., 1 *Ld. Raym.* 690., and 12 *Mod.* 551., the distinction between a covenant not to sue a sole obligor and one of several obligors is taken; in the latter it is said "A. is bound to B., and B. covenants never to put the bond in suit against A.; if afterwards B. will sue A. on the bond, he may plead the covenant by way of release. But if A. and B. be jointly and severally bound to C. in a sum certain, and C. covenant with A. not to sue him, that shall not be a release but a covenant only; because he covenants only not to sue A., but does not covenant not to sue B.; for the covenant is not a release in its nature, but only by construction to avoid circuitry of action; for where he covenants not to sue one, he still has a remedy, and then it shall be construed as a covenant and no more."

LORD KENYON Ch. J. The last case, to be sure, removes all difficulty on this subject, and is a direct authority in favour of the plaintiff. I had only been doubting in my own mind on the strict law of the case; for that the honesty and justice of it are with the plaintiff cannot be doubted. Even if the defendant had succeeded here, a Court of Equity would have given the plaintiff full relief. But I am glad to find by the two cases cited by the plaintiff that we are fully warranted in deciding in favor of the plaintiff on legal grounds.

Per Curiam,

Rule absolute,

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Tuesday,
Feb. 12th.

Ex parte THOMAS EVANS.

The house of correction for the county of *Middlesex* adapted to the separate reception of felons pursuant to the 22 Geo. 3. c. 64. and other acts is a legal prison for the safe custody of persons under a charge of high treason.

FERGUSSON on a former day obtained a rule calling upon *Thomas Aris* the governor of the house of correction for the county of *Middlesex* to shew cause why a writ of habeas corpus should not issue directed to him commanding him to bring up the body of *Thomas Evans*; which rule was drawn up on reading the affidavit of *J. A. Bonney*, and a copy of *Evans's* commitment, whereby it appeared that he was committed to the house of correction for high treason, there to be kept safe and close till he should be delivered by due course of law, by virtue of a warrant issued by the Duke of *Portland*, one of his Majesty's principal secretaries of state. The ground on which the rule was prayed was stated shortly to be, that a house of correction was not a legal place of custody for persons under a charge of high treason; and on this day *Fergusson* was desired to state the particular grounds of his objection to the commitment.

By the common law, affirmed by various statutes (a), all persons charged with crimes are to be kept in the common county gaols, which are under the custody of the sheriffs, who are the King's known responsible officers for this purpose (b); and no other places for safe custody are known to the law (excepting the gaols of lords of franchises, which have the same origin) unless such as have been expressly created since by acts of parliament for particular purposes, beyond which purposes even these gaols are no legal places of custody (c). And therefore though it be true that the King may choose (as it is said) his prison, which power is exercised by this Court, yet that must necessarily be understood of legal prisons; for the King cannot make any place he pleases a prison. In *Mendall's* case (d) this Court thought that their power of commitment was not confined to the Marshalsea, but that they might commit to any sheriff in *England*. And in *Kendall's* case (e) Lord *Holt* admitted that, generally speaking, commitments ought only to be to the common gaol, but he thought that one charged with high treason might be committed to the custody of a messenger of the secretary of state during examination. The act

(a) 14 Ed. 3. st. 1. c. 10. 13 Ric. 2. c. 15.
19 H. 7. c. 10. and 11 and 12 W. 3. c. 19.
s. 3.
(b) *Mitton's* case, 4 Co. 34. 1 *Ander.* 345.

(c) 2 Inst. 705.

(d) 1 Sid. 145.

(e) 5 Mod. 84. and Salk 347.

of the 5 *H. 4. c. 10.*, reciting the mischiefs which had arisen from constables of castles imprisoning persons therein till they had ransomed themselves, ordains "that none be imprisoned by any justice of the peace *but only in the common gaol*," saving to lords their franchises; and Lord Coke (a) considers that all other Judges are bound by this law. The Tower indeed is a legal prison for state prisoners by immemorial usage (b). But houses of correction, which are of about 220 years standing, are by several acts of parliament made prisons for particular purposes only, and cannot be used as prisons for any other. The 18 *Eliz. c. 3.* first provided for the building of them in every county, which was followed up by the 39 *Eliz. c. 5.* and 7 *Jac. 1. c. 4.*, by which latter act Lord Coke explains (c) the word "*offenders*" used in the 39 *Eliz.* to mean "rogues and vagabonds, sturdy beggars, and other idle and disorderly persons", for whom these houses of correction were intended; and it is plain from the whole of what Lord Coke (d) says in his chapter upon this subject that they were not intended as places of safe custody, but for the punishment of offenders, which the statutes themselves indeed sufficiently indicate. Then the 11 & 12 *W. 3. c. 19. s. 3.* enacts that all murderers and felons shall be imprisoned in the common gaol *and not elsewhere*; and that the sheriff shall have the keeping of the said gaols. The 6 *Geo. 1. c. 19. s. 2.* recites "that whereas vagrants and other criminals offenders and persons charged with small offences are for such offences or for want of sureties to be committed to the *county gaol*, it being adjudged that by law the justices of the peace *cannot commit them to any other prison for safe custody*, which by experience hath been found to be very prejudicial and expensive;" therefore it enacts that such persons may be committed by justices of the peace either to the common gaol or house of correction as they shall think proper. The term "*small offences*" there used, for which persons charged therewith may now be sent to the house of correction, seems confined to petty larcenies, such as are usually tried at the quarter sessions, but cannot be taken to extend to high treason. Then (e) the 22 *Geo. 3. c. 64.*, which prescribes certain regulations for the government of houses of correction, directs the justices of peace in each county to contract for any alterations or new buildings which may be deemed necessary, and amongst other

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EVANS.(a) 2 *Inst.* 43.(b) *Per Holt, Ch. J. R. v. Kendal*, 5 *Mod.* 82.(c) 2 *Inst.* 730.(d) 2 *Inst.* 728.(e) Vide 17 *Geo. 2. c. 5. s. 31, 32.* as to
the regulation of houses of correction.

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things, that separate apartments shall be provided for all persons committed upon charges of felony, or convicted of any theft or larceny and committed for punishment by hard labour, in order to prevent any communication between them and the other prisoners. By *f. 5.* the expences of these houses are to be defrayed by a county rate; and *f. 14.* enacts certain regulations to be observed in every house of correction established or to be established under the acts of the 7 *Jac. 1. c. 4.* 17 *Geo. 2. c. 5.* and 22 *Geo. 3.* This last-mentioned act was amended, and the time for making contracts for the building or adding to such houses of correction was enlarged by 24 *Geo. 3. st. 2. c. 55.* which gives power to the justices of the peace to commit to the house of correction persons convicted before them in a summary way. Lastly the 27 *Geo. 3. c. 11.*, reciting that doubts had arisen whether such of the provisions in the 6 *Geo. 1. c. 19.* as gives a discretionary power to justices of the peace "to commit vagrants and other criminals offenders and persons charged with small offences, either to the common gaol or house of correction, extended to offences committed against subsequent acts, where such offenders are ordered to be committed to the common gaol," enacts that they may commit offenders of that description to either place in all cases where by any law then in force or thereafter to be made the justices are authorised to commit to the county gaol. By these acts of parliament therefore the power of committing for safe custody to the house of correction is confined to certain cases, of which this is not one. Besides, the regulations of houses of correction, as required by 22 *Geo. 3.* and other statutes, are not adapted to persons confined for high treason. The governor is appointed by the justices of the peace and not by the King, and he is responsible to them only: but they have not even cognizance over the offence. Again, the governor has a power of punishing offenders in his custody for misconduct in certain cases, and there seems to be no distinction, at least in terms, in this respect between those who are imprisoned for safe custody and those in execution. And if this be a legal prison, it might as well be contended that a person charged with high treason might be sent on board the hulks or to one of the penitentiary houses as to a house of correction, although they were in like manner established for particular purposes only.

The Attorney General, contra, admitted that if this were not a legal prison to which the defendant had been committed, the

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Court would grant the writ of habeas corpus. So they would if a party were committed merely for safe custody to the hulks or a penitentiary house, because by acts of parliament those prisons are only adapted to convicts. But the house of correction in question, which was built by virtue of the 26 Geo. 3. c. 55. upon the site of the old one, and which has been adapted to the separate reception of felons according to the regulations of the 22 Geo. 3. c. 64, is a legal prison for this purpose; and since the building of it *Upton*, *Le Maitre*, and others, have been committed thither for safe custody under similar charges. There can be no distinction between legal prisons for felony and for high treason; the latter it is said includes the former; and certainly there is no reason for making any distinction between them. All that public policy requires is that persons charged with offences shall be committed to public and not to secret prisons; in recognition of which principle the act of the 5 Hen. 4. c. 10. was passed, requiring prisoners to be committed to the common gaol; for otherwise, as was said in *Scavage v. Tateham* (a), when the justices come to deliver the gaol the prisoner may not be delivered, and so should lie longer than is reasonable. But such a mischief cannot happen in respect of this prison: for the calendars of the prisoners in custody, which by 3 H. 7. c. 3. are to be returned under a heavy penalty by every keeper of a gaol to the next gaol delivery for the county where such gaols have been or should hereafter be, have been uniformly returned from this and other houses of correction established upon the same principle ever since their erection. It appears by all the acts referred to down to the 11 & 12 W. 3. c. 19. s. 3. that other persons than sheriffs have had the legal custody of prisoners before trial; for in that act there is an express saving of the rights of persons having common gaols by inheritance &c, which must have been claimed under grants of the Crown; and there are several instances of commitments to prisons of different descriptions, as appears by a list (b) of commitments from the Secretary of State's office and by returns to writs of habeas corpus in the Crown-office (c). And since the 22 Geo. 3. c. 64. directs houses of cor-

(a) *Cro. Eliz.* 830.

(b) The Attorney General referred to such a list, which was in court, whereby it appeared that at different periods within the present century, persons had been committed for state offences to the house of correction in *Middlesex*.

(c) These were for the most part returns

of commitments to the Gatehouse prison *Westminster*, beginning from 6 W. & M. down to the 12 Geo. 2. There was also one instance 12 Geo. 1. of a commitment by a justice of peace of one *John Picard* to the New Prison *Clerkenwell* for seditious and treasonable words.

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rection to be built in a particular manner for the reception of felons and persons committed for felony separately from the other prisoners, and the 24 G. 3. *st.* 2. *c.* 55. and 31 G. 3. *c.* 46. recognize commitments to them for felony, and put them upon the same footing as common gaols, they must now be taken to be so to all intents and purposes, although perhaps they might not originally have been intended for safe custody. The doubt expressed by the 27 G. 3. *c.* 12. was not whether felons in general might be committed to these houses of correction, but only whether when particular acts of parliament had directed justices to commit certain offenders to the common gaol, they could commit them to these houses of correction; which doubt the act removes, and it enables them so to do. Therefore it confirms the argument that since the statutes of the 22d and 24th of the King, houses of correction built on the plan there pointed out are put on the same footing as common gaols in respect to the confinement of felons for safe custody. No injury can arise to the subject from this construction, because it is clear that the punishments prescribed for persons convicted and imprisoned in these houses can never be applicable to those who are confined there for safe custody only before trial.

Fergusson, contra, denied the conclusion that, supposing houses of correction were legal prisons for the safe custody of felons, therefore they were also legal for the confinement of persons accused of high treason; because the latter cannot be considered as included in the term Felony. And no authority can make a legal prison but an act of parliament, which cannot be extended beyond the particular offences enumerated, especially where those enumerated are of an inferior nature.

LORD KENYON Ch. J. We shall defer giving our opinions until we have looked into the acts of parliament which have been referred to; but I will say a few words at present upon some of the topics which have been touched upon in argument. On general principles I am clear that all the prisons in the kingdom are the King's prisons, and that we may commit prisoners to any legal prison, although not under the control of the sheriff. There are many legal gaols which are held by different persons, such as that of the Gatehouse *Westminster*, which was formerly the inheritance of a Lady *Broughton*. that of the county of the city of *Chester*, which is under the constable of *Chester*; that of the county of *Devon*, of which till lately the *Rolle* family were the hereditary gaolers; and others of the same kind. So there may be more
than

than one common gaol in the county, as in *Suffolk*, *Somersetshire*, *Wiltshire*, and other counties. Now here it appears that from the year 1715 commitments have been made to the house of correction in this county; and we are called upon to overthrow a practice which has subsisted during the times of Lord *Raymond*, Lord Ch. Just. *Ryder*, Lord Ch. Just. *Lee*, and Lord *Mansfield*, without any question. We should pause before we say that all that has been done for so long a period and under such Judges has been illegal; more especially as there is no question concerning the liberty of the subject really involved in this inquiry; for this party must at all events be imprisoned till he is entitled to his final discharge by due course of law. The words "*small offences*" in the 6 G. 1. which have been relied on as shewing that the magistrates before that time could not commit felons to the house of correction does not remove the difficulty which the defendant's counsel was pressed with from the practice which has prevailed so long of committing felons there; for when an act of parliament begins with naming an offence of a certain magnitude and then speaks of smaller offences it cannot be extended to higher crimes; now felony is a crime of a higher nature than what is first mentioned in the statute. It cannot therefore respect the case of felons; nor can the practice which has prevailed of committing them to houses of correction be founded upon the authority of that statute. As to what has been thrown out *ad captandum* respecting the hulks and penitentiary houses, it admits of a plain answer; those are places appointed by particular acts of parliament for particular descriptions of convicts, to which purpose only they can be applied. The Legislature have certainly made provision for the reception of *felons* for safe custody in houses of correction; and the expences of building these houses being thrown upon the counties is not peculiar to them, for the counties are also charged with the expences of building the common county gaols, to which it is admitted that this Court may nevertheless commit.

On the next day Lord *Kenyon* said, we have looked into the statutes regulating houses of correction to see if the regulations respecting them made them improper places of confinement for prisoners of this description, in consequence of the argument drawn from those regulations; and we do not think that the regulations insisted on apply so as to make this house of correction an improper place of confinement for safe custody. And after the practice which has prevailed for so long a time past we see no objection to the legality of the present commitment.

Rule discharged.

Tuesday,
Feb. 12th.

The KING against The Inhabitants of CHILVERSCOTON.

If it do not distinctly appear on an order of removal that the justices who made it had jurisdiction, it is a nullity, and not merely voidable; and the parish, to which it is directed, may object to it at any distance of time though they never appealed against it, and though they have acted under it for 20 years.

TWO justices removed *W. Fennell, E.* his wife and their five children, from *Sow* in the county of the city of *Coventry* to *Chilverscoton* in the county of *Warwick*. The Sessions, on appeal, confirmed that order, and stated the following case for the opinion of this Court.

The pauper, *W. Fennell*, was born about 55 years ago in *Sow*, but was settled in *Chilverscoton*. In 1779 he married his present wife in *Bedworth* where he then resided. They were afterwards removed to *Sow* by the following order; "To the churchwardens and overseers of the poor of the parish of *Bedworth* in the county of *Warwick* and to the churchwardens and overseers of the parish of *Sow* in the county of the city of *Coventry*; whereas complaint has been made by you the churchwardens and overseers of the poor of the said parish of *Bedworth* unto us whose hands and seals are hereunto set two of his Majesty's justices of the peace (whereof one is of the quorum) for the county aforesaid that *W. Fennell* and *E.* his wife &c &c." [The other parts of the order were in the regular form; the order was dated 16th of *March* 1779; and there was no county mentioned in the margin of the order.] Against this order there was no appeal. Afterwards in *May* 1779 a certificate was granted by the parish of *Sow* to the parish of *Bedworth*, acknowledging the said *W. Fennell* and *E.* his wife to be settled in *Sow*, but at the time of granting this certificate no settlement had been gained in *Sow*, unless the above order of removal from *Bedworth* to *Sow* had conferred one: but the pauper *W. Fennell*'s settlement had always continued in *Chilverscoton*. The question before the Court of Sessions was whether the above order of removal from *Bedworth* to *Sow* unappealed from were good and binding or defective and void.

Gibbs, Reader, and Burton Morice, in support of the order of Sessions (a). The question is whether the former order of removal from *Bedworth* to *Sow* be only voidable, or absolutely void. If the former, it may be admitted that as it was not appealed against it is now conclusive; if the latter, it may be treated as a nullity at any time, and then the justices were warranted on this occasion in removing the paupers from *Sow* to *Chilverscoton*, notwithstanding there was no appeal against the order made in 1779. Now the former order was absolutely void in itself, because it does not appear that the justices who removed had any authority to make it. It is directed to the parish-officers of two parishes lying in different counties, and it is only said in the order that the justices who re-

(a) This case was argued on *Wednesday, Feb. 6th.*

removed were justices for *the county aforesaid*, without saying for which of the two counties; and unless they were justices for the county of *Warwick*, they had no jurisdiction to make the order. This was holden to be a decisive objection in *R. v. The Inhabitants of Stepney*, *Burr. S. C.* 23, where it was said that those who act under a jurisdiction given by act of parliament must shew their jurisdiction. And in *R. v. Swalcliffe* (a) it was ruled that an order of removal to a place that did not maintain its own poor separately was a nullity. Again, in *R. v. Hulcott* (b), where all the former cases on this subject were cited and considered, an order of a justice of the peace for discharging a servant from the master's service under the stat. 5 *Eliz. c. 4.* was holden to be void (and not merely voidable), because it did not appear on the order itself that *she was a servant in husbandry*. Here the defect appears on the order itself, and therefore it is open to objection whenever an attempt is made to introduce it as evidence in a court of justice. This is a stronger case than that of *Grepps v. Durden*, *Cowp.* 640, where, a magistrate having convicted the plaintiff in four several penalties for offences on the same day when by law he had only authority to convict him in one penalty, it was holden that the three last convictions were void, being an excess of jurisdiction in the magistrate, and that the defendant (the magistrate) was liable to an action of trespass brought by the plaintiff for acting under them, though they had not been quashed by this Court, and though the defects could not appear on the convictions themselves. The case of *R. v. Stotfold* (c), which will be relied on by the other side, where it was holden that an order of removal which had been signed by two justices separately in two different counties was only voidable and not void, is distinguishable from this, because there the objection did not appear on the face of the order. Then if the former order be absolutely void, the certificate which was granted in 1779 by *Sow* to *Bedworth* is not conclusive as between *Sow* and a third parish; for though as between the parish granting it and the parish to which it is granted the certificate is conclusive on the former, yet as between the certifying parish and a third parish it is only presumptive evidence against the former, which may be explained; *R. v. Lubbenham*, *ante*, 4 vol. 251. And here the facts stated in the case rebut that presumption.

Wilson, Afcough, and Parke contra. The former order made in 1779 was not absolutely void, only voidable; and therefore as it was not appealed against it is now conclusive on the parish of *Sow*. Two counties are mentioned in the beginning of the order, and afterwards the words "for the county aforesaid" are used, which may

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(a) *Cald.* 248.(b) *Ante*, 6 vol. 583.(c) *Ante*, 4 vol. 596.

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ants of
CHILVER-
SEOTON.

refer to the one or the other (a), and was matter of inquiry on an appeal. If on such appeal it had appeared that the justices who made the order of removal were justices of the county of the city of *Coventry*, then the order would have been quashed as having been made by persons who had no jurisdiction: but if it had appeared that they were justices of the county of *Warwick*, then the order might have been amended under the stat. 5 Geo. 2. c. 19. s. 2. But the parish of *Sow*, having acquiesced under this order for twenty years, ought not at this distance of time to be permitted to object to it in this collateral way. In *R. v. Stepney*, which has been principally relied on, the order was not treated as a nullity; it was only considered as voidable, and there was an appeal against it. So in *Walton v. Chesterfield* (b), where it was only stated in the order of removal that it was made "by us", without saying "two justices &c," a greater defect than in the present order, the order was appealed against. So in a variety of other instances where the defect has appeared on the order, the order has only been considered as voidable, and an appeal has been entered against it. As, because not said to be "on complaint", *R. v. Hareby, Andr.* 361; nor "on complaint of the churchwardens and overseers &c." *Weston Rivers and St. Peters, Salk.* 492 (c); nor that they were only "justices of the county", not "justices of the peace". *R. v. Uplin, Cas. of Set.* 27; or "justices in (and not for) the county." *R. v. Owlton, Sess. Cas.* 2 vol. 76; nor that the justices were not of the quorum. *Albright v. Skipton, 1 Str.* 300. And yet if the present objection prevail, the Sessions did wrong in all those cases in receiving the appeal, and this Court in taking notice of such orders when removed here by certiorari. The case of *R. v. Stotfold* (d) is a strong authority to shew that this was only a voidable order; there an order which had been signed by two justices separately and in different counties was holden, after great consideration, to be only voidable; and the reasoning of Lord Kenyon in giving the opinion of the Court is applicable to this case, "It would be extremely inconvenient to permit a parish to set aside an order of removal at any distance of time which has been acquiesced under for years without any dispute". It is no answer to this authority to say that there the defect did not appear on the face of the order; for if an instrument be absolutely void, it is immaterial

(a) Qu. If the order in question might not be read so as to be considered as a valid order. It is directed to the parish-officers of *Bedworth* in the county of *Warwick*, and to the parish-officers of *Sow* in the county of the city of *Coventry*; then the subsequent words "for the county aforesaid" may refer to "the county of *Warwick*" and not to the

county of the city of *Coventry*."

(b) 5 Mod. 322.

(c) It is rather to be collected from the language of this report that there was no appeal, and that only the order of two justices was removed here by certiorari.

(d) *Ante*, 4 vol. 596.

whether the defect appear on it or be shewn by parol evidence. This case is clearly distinguishable from the two cases cited, *R. v. Swalcliffe*, and *R. v. Hulcott*. In the former, there being no parish-officers in the place to which the removal was made, there could be no appeal; there were no persons who could be appellants. And in the latter, the order being a proceeding merely between the master and the servant to which the parish was not a party, the parish had no opportunity of appealing against it, and therefore it was properly decided that the parish should afterwards be permitted to object to the validity of the order when it was produced in evidence against them as a legal order.

Lord KENYON Ch. J. It is now too late to discuss one of the points made at the bar, namely, whether or not the Court of Quarter Sessions could amend in this case, it having been decided in *R. v. Great Bedwin (a)* that the Sessions can only amend mere defects or wants of form. I verily believe that, if the Legislature had been asked what was their intention when they passed the statute 5 Geo. 2. c. 19., they would have said they meant that if upon inquiry it appeared that the pauper had been removed to his proper parish the Sessions should have power to correct all defects in the order: but the decision to which I before alluded was made ten years after the passing of the act, and at a time when Lord Chief Justice Lee, who was peculiarly conversant in sessions law, presided here. And though I lament that that decision was made, because it renders the statute of little avail, yet it has been acted upon ever since, and it is important to adhere to determinations respecting settlements. Then is this an objection of form or of substance? It certainly is a matter of substance. It should appear on the face of the order that the justices who made it had jurisdiction: if they had jurisdiction, every fair presumption will be made that they decided rightly: but if they had not, the proceeding is a nullity. It is said however that the parish of *Sow* ought not to be permitted at this distance of time to object to the order; but there is a maxim that quod ab initio non valet tractu temporis non convalescet. And as this order was void at the time when it was made because it does not appear that the justices who removed had any jurisdiction, it cannot have become a valid order by the time that has since elapsed. The general proposition indeed, that an order of removal unappealed against is conclusive on the parish to which the removal is made, cannot be shaken: but it must be understood as part of that proposition that the order is not a

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The KING
against
The Inhabit-
ants of
CHILVER-
SCOTON.

(a) *Burr. S. C.* 165.

1799.

The KING
against
The Inhabit-
ants of
CHILVER-
SCOTON.

nullity, but was made by two justices having jurisdiction to make it.

The case of the King v. *Stepney* is (I think) decisive of the present.

GROSE J. In *R. v. G. Bedwin* it was holden that the Sessions cannot amend an order of removal in matters of substance. Then if the former order made in 1779 could not have been amended by the Sessions on an appeal, it purports to be an order made by two persons who, it does not appear, had jurisdiction to make it. The only way in which this difficulty can be obviated is by intending that they had jurisdiction: but in *R. v. Stepney*, Lord *Hardwicke*, Mr. J. *Page*, and Mr. J. *Probyn* all said that such an intention cannot be made. This then must be taken as an order made by two persons who had no jurisdiction, and consequently it is not conclusive on the parish of *Sow* to which it was directed.

LAWRENCE J. expressing some doubt on the subject, the case was not then finally decided. But now

Lord KENYON Ch. J. said, We have considered the cases cited, and are of opinion on the authority of *R. v. Stepney*, and *R. v. G. Bedwin*, that the former order was a nullity, and though it was not appealed against it is not conclusive on the parish of *Sow*.

LAWRENCE J. I was struck with one of the arguments at the bar, that the Sessions might have inquired on an appeal against the original order whether the justices who made it were of one county or the other; and on that I hesitated at first. But the stat. 26 G. 2. c. 27. gives an answer to that argument; for it might as well have been argued before that act passed that the Sessions might have inquired under the stat. 5 Geo. 2. c. 19. whether or not the justices who made an order of removal were or were not of the quorum; and yet the Legislature thought it necessary to pass the stat. 26 Geo. 2. c. 27., enacting that no order made by two or more justices of the peace "which doth not express that one or more of the justices is or are of the quorum shall be set aside or vacated for that defect only;" which would not have been necessary if the justices at the sessions could have inquired into and amended such a defect under the stat. 5 Geo. 2.

Per Curiam,

Order of Sessions confirmed.

In the vacation after this term a patent of precedence was granted to *R. Richards* Esq. of the Inner-Temple, to take rank next after the Honourable *S. Perceval*.

And in the term *John Vaughan* Esq. of *Lincoln's Inn* was called to the degree of Serjeant at Law.—The motto on his rings was "*Paritulus se legibus amba.*"

END OF HILARY TERM.

C A S E S

1799.

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Easter Term,

In the Thirty-ninth Year of the Reign of GEORGE III.

CUMMINS *against* ISAAC.

BAYLEY obtained a rule in the last term, calling on the plaintiff to shew cause why the judgment entered in this cause on a bond and warrant of attorney to confess judgment should not be set aside, and the warrant of attorney delivered up to be cancelled. These securities had been granted for securing an annuity, the ground of objection to which was a defect in the memorial registered by virtue of the 17 Geo. 3. c. 26. §. 1. in not setting out one of the trusts in an indenture which was part of the assurance for the annuity; viz. that "in case the grantor should at any time leave this kingdom, whereby the grantee should be put to any extra expence in insuring the grantor's life, then the grantee should retain (out of a larger annuity which had before been given to the grantor by another person and which was assigned to the trustee for securing the annuity in question) and pay all such extra expence as he should be put to in respect thereof."

Abbott shewed cause in the last term against the rule. The annuity act requires that the memorial should contain the names of all the parties and for whom any of them are trustees, but it does not

Friday,
April 12th.

An annuity was set aside because one of the trusts (viz. that in case the grantor should leave the kingdom he should pay any extra expence of the grantee in insuring his life,) was not stated in the memorial.

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CUMMINS
against
ISAAC.

require that all the trusts should be stated. It also requires a statement of the annual sum or sums to be paid; but that only means such sums as are to be paid to the grantee for his benefit. Now here the grantee is to derive no pecuniary benefit to himself from the premium of insurance upon the grantor's life, but merely to reimburse himself the additional expence if cast upon him. The event also on which such premium is to be paid is uncertain, and depends entirely on the act of the grantor alone, and in fact it never has taken place. In *Toldervy v. Allan* (a) the question was not determined, whether it were necessary to set out all the trusts, because it afterwards appeared that in fact they were all stated. And in *Doe v. Dolman* (b) there was an omission of the name of one of the cestui que trusts, which brought the case directly within the words of the annuity act.

Lord KENYON Ch. J. then expressed an opinion that this trust ought to have been stated in the memorial, as the annuitant derived an additional benefit under it. But on the application of the grantee's counsel, the case stood over till this term; when

Abbott admitting that he had no additional argument to offer,

Lord KENYON said that the annuity was clearly void on account of this defect in the memorial. That the clause omitted was part of the *res gestæ*, which the learned Lord, the author of the bill, had often said on the other side of the Hall ought always to be stated in the memorial.

Per Curiam (c),

Rule absolute (d).

(a) *Ante*, 5 vol. 480.

(b) *Ib.* 641.

(c) Mr. J. *Abbott* was indisposed and

unable to attend during any part of this term.

(d) See the next case.

Saturday,
April 13th.

TAYLOR against JOHNSON.

In a conveyance of a life-interest in an estate to a trustee in trust for securing an annuity, it was first stipulated that the trustee should permit the

grantor to receive the rents and profits till default made in the payment of the annuity, and then in trust for the grantee; the memorial of the annuity stated the trust to be for the grantee generally, which was holden ill.

IN replevin the defendant avowed taking the goods for a distress for the arrears of an annuity of 150*l.* secured upon an estate for life. And the question turned upon the validity of the memorial which had been registered according to the statute 17 *Geo.* 3. c. 26. The memorial, after stating the grant of the annuity to the defendant, set forth that for better securing the payment of the same during the natural lives of *A. C. K.* and *T. S.* and the sur-

vivor of them, and in consideration of 10*s.* paid to *T. S.* by *R. M.*, *T. S.* granted to *R. M.* the premises to hold to him for 99 years if the said *A. C. K.* and *T. S.* or either of them should so long live, in trust for the defendant *Johnson &c.* The deed when produced at the trial contained a previous trust for the trustee to permit *T. S.* to receive the rents and profits *until default made in payment of the annuity* to the defendant, and then in trust for the defendant: and the objection was that such prior trust was not stated in the memorial, which

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TAYLOR
against
JOHNSON.

LAWRENCE J., before whom the cause was tried at the last *Shrewsbury* assizes, held to be fatal; and a verdict was taken for the plaintiff, with liberty for the defendant to move to enter a verdict for him if this Court should be of a different opinion.

Milles now moved accordingly; contending that it was sufficient under the annuity act to state in the memorial those trusts only which were created for the benefit of the grantee to secure his annuity; for in those respects only was the interest of the grantor affected by the conveyance. That the trust in question was not of that description, for it left the interest of the grantor as it stood before so long as the annuity was regularly paid; and the substance of the conveyance was the trust in favor of the defendant, which was set out in the memorial.

LORD KENYON Ch. J. The memorial has not truly declared even the grantee's estate and interest in the trust premises; for it states that he has an absolute and present interest in them when it appears to be only future and contingent. The legal estate passed to the trustee moulded in a certain form, and therefore the memorial ought to have shewn in what respect it was modified.

GROSE J. was of the same opinion, and adverted to the decision of the Court yesterday (a) as applicable to the present case.

LAWRENCE J. The ground of my opinion at the trial was that the memorial ought to have stated all the trusts contained in the deeds for securing the annuity, as well those which were introduced for the benefit of the grantor as those for the benefit of the grantee. For the act of parliament requiring the memorial was passed in order to protect the interests of improvident men of whom undue advantage might be taken in their distress; and therefore it was essential that it might be known by inspecting the memorial that the grantor was entitled to the rents and profits of the

(a) See the preceding case.

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TAYLOR
against
JOHNSON.

estate which was conveyed until he made default in paying the annuity.

Rule refused.

Saturday,
April 13th.

MERRYWEATHER *against* NIXAN.

If A. recover
in tort against
two defend-
ants, and
levy the
whole dama-
ges on one,
that one can-
not recover
a moiety
against the
other for his
contribution;
aliter in as-
sumpsit.

ONE *Starkey* brought an action on the case against the present plaintiff and defendant for an injury done by them to his reversionary estate in a mill, in which was included a count in trover for the machinery belonging to the mill; and having recovered 840*l.* he levied the whole on the present plaintiff, who thereupon brought this action against the defendant for a contribution of a moiety, as for so much money paid to his use.

At the trial before Mr. Baron *Thomson* at the last *York* assizes the plaintiff was nonsuited, the learned Judge being of opinion that no contribution could by law be claimed as between joint wrongdoers; and consequently this action upon an implied assumpsit could not be maintained on the mere ground that the plaintiff had alone paid the money which had been recovered against him and the other defendant in that action.

Chambre now moved to set aside the nonsuit; contending that, as the former plaintiff had recovered against both these parties, both of them ought to contribute to pay the damages. But

Lord KENYON Ch. J. said there could be no doubt but that the nonsuit was proper; that he had never before heard of such an action having been brought where the former recovery was for a tort. That the distinction was clear between this case and that of a joint judgment against several defendants in an action of assumpsit. And that this decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right.

Rule refused.

The case of *Philips v. Biggs*, *Hardr.* 164. was mentioned by *Law*, for the defendant, as the only case to be found in the books in which the point had been raised: but it did not appear what was ultimately done upon it.

HALL *against* ROCHE.Saturday,
April 13th.

THE defendant obtained a rule calling on the plaintiff to shew cause why the bail-bond given in this cause should not be delivered up to be cancelled, on an affidavit made by the defendant, which stated that he was arrested at *Rockester* 30 miles from *London* on the 26th of *January* last at 4 o'clock in the afternoon by *J. Carter* one of the officers of the sheriff of *Kent* who would not then produce any warrant though requested, saying he had no warrant but that it was at the office of Mr. *Jeffery* at *Chatham*; and that on searching at the King's Bench office it appeared that the writ was not issued until the 26th of *January*.

The bail bond was ordered to be delivered up to be cancelled, because the defendant was arrested before the officer had any warrant and before the writ was delivered to the sheriff.

Marryat shewed cause against this rule. First, the ground of this application is that the defendant was arrested before the writ was delivered to the sheriff or any warrant issued by him: that fact however is not positively stated in the defendant's affidavit; it is only to be collected by intendment. And for any thing that appears to the contrary the officer may have had the warrant at the time of the arrest. But, secondly, even if the fact were so, that is no reason why the present application should be granted; for if the arrest be made after the writ is sued out though before it be delivered to the sheriff, the officer who makes the arrest is not liable to an action of false imprisonment. *Jones v. Greaves*, 2 *Lev.* 19; and 2 *Saund.* (a) 298, 9; and *Osborne v. Brookhouse* (b), 3 *Lev.* 93. And a known officer is not bound to produce his warrant.

Littledale, in support of the rule, after observing that the cases cited were prior to the stat. 6 *Geo. I. c. 21. (c)*, was stopped by the Court.

Lord KENYON Ch. J. If the fact be, as is now suggested by the counsel against the rule, that the writ was delivered to the sheriff

(a) But according to the report of this case in *Saunders* it is rather to be collected that the Court did not decide this point, but simply that on those pleadings it must be intended that the writ was delivered to the sheriff before the arrest.

(b) In this as well as in the other case before cited a warrant was delivered to the officer before the arrest.

(c) The 53d section of which (after reciting that under-sheriffs make and deliver

out blank warrants to attornies and bailiffs for arresting persons on mesne process without having any writ to justify the same) enacts that if any sheriff &c shall make or deliver any warrant either in blank or filled up in part or in all before he shall actually have in his custody the writ &c he shall forfeit 10*l.*—And the 54th section requires that the day and year when the writ is sued out shall be set down on the warrant.

1799.

HALL
against
ROCHE.

before the arrest and that the officer had a regular warrant, it should have been stated in an affidavit in answer to the rule. But no such fact being stated in any affidavit though the plaintiff has had time to procure such an affidavit, it must now be taken that the officer made the arrest without any warrant and before the writ was delivered to the sheriff; and if so, the arrest was illegal. If it be established as law by the cases cited that it is not necessary to shew the warrant to the party arrested who demands to see it, I will not shake those authorities: but I cannot forbear observing that if it be so established, it is a most dangerous doctrine; because it may affect the party criminally in case of any resistance; and if homicide ensue, the legality of the warrant enters materially into the merits of the question. I do not think that a person is to take it for granted that another, who says he has a warrant against him without producing it, speaks truth. It is very important that, in all cases where an arrest is made by virtue of a warrant, the warrant (if demanded at least) should be produced. However, without deciding that point, I am clearly of opinion that this rule should be made absolute, on the ground that the defendant was arrested before any warrant was made to the officer or any writ delivered to the sheriff.

Rule absolute.

Monday,
April 15th.OGLE and Another *against* BARNES and Others.

If A. wilfully run his vessel against B.'s, and damage ensue, B. may bring trespass: but if A. so negligently steer his vessel that it runs foul of B.'s, then case is the proper action.

THIS was an action upon the case. The declaration stated that the plaintiffs were possessed of a ship called the *Anne*, which was sailing on a certain voyage &c, and that the defendants were possessed of another ship, called the *Acteon*, also sailing &c, of which they had the care direction and management, but that they so incautiously carelessly negligently and inexpertly managed steered and directed their ship and took such bad care of the management steering and direction thereof that the said ship of the defendants through the mere default and by reason of the negligence carelessness ignorance and unskilfulness of the defendants with great violence and force sailed against and ran foul of and came upon and against the ship of the plaintiffs and struck against the said ship of the plaintiffs with great force, so that the plaintiffs' ship was greatly damaged &c. The second count in the declaration only varied

from the first in stating that the defendants' ship was under the care and direction of *Barnes* one of the defendants and of certain servants of the defendants &c.

The plaintiffs having obtained a verdict, the defendant moved in arrest of judgment, on the ground that the present action was misconceived, for that the plaintiffs ought to have brought trespass and not an action on the case.

Erskine, *Gibbs*, and *Alderson*, now shewed cause against that rule. It appears from a variety of cases, particularly *Reynolds v. Clarke* (a), *Haward v. Banks* (b), *Day v. Edwards* (c), *Savignac v. Roome* (d), and *Tripe v. Potter* (e), that the distinction between the actions of trespass and case is this; if the injury be occasioned by the immediate act complained of, an action of trespass must be brought; but if the injury be merely consequential upon that act, an action upon the case is the proper remedy. But to support an action of trespass there must be some act done by the defendant; as in *Day v. Edwards*, where the defendant so *furiously* (which is equivalent to *wilfully*) drove his horse and cart that the cart was driven and struck with force against the plaintiff's carriage; or, as in *Savignac v. Roome*, where the defendant's servant *wilfully* drove against the plaintiff's carriage, in which case it was holden that trespass was the proper remedy and that an action on the case could not be supported. Now in this case it does not appear that any act whatever was done by the defendants: on the contrary it appears on the declaration that the injury complained of was occasioned by their negligence. And in *Morley v. Gaisford* (f), where it was stated that the defendant so *negligently* drove his horse and cart that the cart struck against the plaintiff's chaise, it was holden that case, and not trespass, was the proper remedy. Such an injury as that of which the plaintiff complains may be occasioned either by the wilful act or the negligence of the defendant: if the former, the plaintiff must bring trespass; if the latter, an action on the case. What was said in *Haward v. Bankes* (g) is peculiarly applicable to this case; "The plaintiff describes in his declaration a fact, which, as it comes out at the trial, may or may not be a proper strict trespass: it might at the trial be proved to be either

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OGLE
against
BARNES.

(a) 1 Str. 634.

(b) 2 Burr. 1113.

(c) Ante, 5 vol. 648.

(d) Ante, 6 vol. 125.

(e) Ib. cited 128.

(f) 2 H. Bl. Rep. 442.

(g) 2 Burr. 1114.

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OGLE
against
BARNES.

trespass or case. It was here proved at the trial to be trespass upon the case. If it had been proved to be trespass vi et armis, the plaintiff must in that event have been nonsuited."

Larw and *Bayley*, in support of the rule, contended that, as the injury done was occasioned by the immediate act of the defendants, the plaintiffs should have brought an action of trespass. In *Weaver v. Ward* (a), where the plaintiff and defendant who both belonged to the trained bands were exercising, and the defendant in firing his musket casually and by accident hurt the plaintiff, it was holden that trespass lay. So in a case in 6 *Edw. 4. 7. a. pl. 18.*, where the defendant having a hedge of thorns adjoining the plaintiff's land cut them, when they fell against the defendant's will on the plaintiff's land, it was holden that trespass lay. [*Lawrence J.* But I believe it was stated in that case that the defendant went on the plaintiff's land, and picked up the thorns (b).] The distinction taken by the plaintiff's counsel between wilful and negligent acts, as applied to this subject, cannot be supported: to constitute trespass it is not necessary that the will of the defendant should concur; for if *A.* in attempting to strike *B.* by accident strike *C.*, *C.* may maintain trespass because the injury is immediate. So in *Scott v. Shepherd* (c), where the defendant had thrown a lighted squib in the street which fell on a stand of wares in the market from whence, to prevent injury, it was thrown by a third person who thereby struck the plaintiff with the squib and put out his eye, it was holden that the plaintiff might maintain trespass against the defendant who had originally thrown the squib, though he did not intend to do the mischief that ensued.

Lord KENYON Ch. J. It is not necessary to have recourse to the Year Books for cases or principles on which to decide the case before us.

All the authorities on this subject agree in the principle which must govern the present case. It is clear that the mind need not concur in the act that occasions an injury to another: if the act occasion an immediate injury to another, trespass is the proper remedy: but if the injury be not immediate but only consequential upon the act done, there the party injured must bring an action on

(a) *Hob.* 134.

(b) "Et le plaintiff vient freshment eu le dit acre &c et eux prist; le quel est mesme le trespass &c." And there no question was

agitated respecting the form of the action; the question being whether any action could be maintained.

(c) 2 *Bl. Rep.* 892; and 3 *Wils.* 403.

the case. This is clearly established in a variety of cases, and particularly in those cited from 1 *Strange*, and 2 *Bl. Rep.*, in the latter of which, though the Judges differed as to the conclusion to be drawn from the facts of the case, they all agreed in the principle. In *Day v. Edwards* and *Savignac v. Roome* the defendants did an act which was immediately injurious to the plaintiffs; in the one case it was alleged that the defendant *furiously*, and in the other that he *wilfully*, drove his cart against the plaintiff's chaise. But it cannot be said that in this case the defendants *vi et armis* did an injury to the plaintiffs when it appears that they did not do any act at all. The charge imputed to these defendants is that they so carelessly and negligently steered their vessel that by reason of such negligence their vessel sailed against and ran foul of the plaintiffs'; and for that negligence they are liable in an action upon the case.

GROSE J. This is a motion in arrest of judgment, and therefore every presumption is to be made in favor of the verdict, at least nothing is to be presumed against it. Now the declaration does not charge the defendants with having done any act wilfully; it only alleges negligence, and it is like the case of *Morley v. Gaisford*, where it was adjudged by the Court of Common Pleas that an action upon the case was the proper remedy.

If the plaintiffs had sustained the injury by the wilful act of the defendants, then this case must have been governed by that of *Tripe and another v. Potter* (a): there the plaintiffs brought an action upon the case against the defendant for wilfully rowing his boat against their net, and Mr. J. Yates, before whom the cause was tried at *Exeter* Summer Assizes 1767, was of opinion that the plaintiffs had misconceived their action; they submitted to a nonsuit, and afterwards brought trespass and succeeded: this clearly shews the distinction between the actions of trespass and case. On this record it is stated that the injury, of which the plaintiffs complain, was occasioned by the negligence of the defendants: if on the trial it had been proved that it was occasioned by their wilful act, the plaintiffs would have been nonsuited: but the jury having found a verdict for the plaintiffs, we must consider that the complaint set forth in the declaration was proved; and for such an injury an action upon the case is the proper remedy.

LAWRENCE J. There is a great deal of good sense in what is stated in the case cited from 2 *Burr.* 1114. Such an injury as the

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(a) *Ante*, 6 vol. 128.

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trespass or case. It was here proved at the trial to be trespass upon the case. If it had been proved to be trespass vi et armis, the plaintiff must in that event have been nonsuited."

Law and Bayley, in support of the rule, contended that, as the injury done was occasioned by the immediate act of the defendants, the plaintiffs should have brought an action of trespass. In *Weaver v. Ward* (a), where the plaintiff and defendant who both belonged to the trained bands were exercising, and the defendant in firing his musket casually and by accident hurt the plaintiff, it was holden that trespass lay. So in a case in 6 *Edw. 4. 7. a. pl. 18.*, where the defendant having a hedge of thorns adjoining the plaintiff's land cut them, when they fell against the defendant's will on the plaintiff's land, it was holden that trespass lay. [*Lawrence J.* But I believe it was stated in that case that the defendant went on the plaintiff's land, and picked up the thorns (b).] The distinction taken by the plaintiff's counsel between wilful and negligent acts, as applied to this subject, cannot be supported: to constitute trespass it is not necessary that the will of the defendant should concur; for if *A.* in attempting to strike *B.* by accident strike *C.*, *C.* may maintain trespass because the injury is immediate. So in *Scott v. Shepherd* (c), where the defendant had thrown a lighted squib in the street which fell on a stand of wares in the market from whence, to prevent injury, it was thrown by a third person who thereby struck the plaintiff with the squib and put out his eye, it was holden that the plaintiff might maintain trespass against the defendant who had originally thrown the squib, though he did not intend to do the mischief that ensued.

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All the authorities on this subject agree in the principle which must govern the present case. It is clear that the mind need not concur in the act that occasions an injury to another: if the act occasion an immediate injury to another, trespass is the proper remedy: but if the injury be not immediate but only consequential upon the act done, there the party injured must bring an action on

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against
BARNES.

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If the plaintiffs had sustained the injury by the wilful act of the defendants, then this case must have been governed by that of *Tripe and another v. Potter* (a): there the plaintiffs brought an action upon the case against the defendant for wilfully rowing his boat against their net, and Mr. J. Yates, before whom the cause was tried at *Exeter Summer Assizes 1767*, was of opinion that the plaintiffs had misconceived their action; they submitted to a nonsuit, and afterwards brought trespass and succeeded: this clearly shews the distinction between the actions of trespass and case. On this record it is stated that the injury, of which the plaintiffs complain, was occasioned by the negligence of the defendants: if on the trial it had been proved that it was occasioned by their wilful act, the plaintiffs would have been nonsuited: but the jury having found a verdict for the plaintiffs, we must consider that the complaint set forth in the declaration was proved; and for such an injury an action upon the case is the proper remedy.

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(a) *Ante*, 6 vol. 128.

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present may be occasioned either by the wilful act or by the negligence of the defendants; it is a question of evidence; if the former, trespass is the proper action; if the latter, an action on the case. If it had appeared in evidence in this case that the defendants, had wilfully done the act, the plaintiffs must have been nonsuited. The negligent and improvident management of the defendants' ship does not imply that any act was done by them: after having been guilty of the negligence which led to the mischief, they may have done every thing in their power to avoid the mischief and then the running against the plaintiffs' vessel may have been owing to the wind and tide. It does not appear upon this record that the defendants wilfully did the act: if the fact were so, they should have taken this objection at the trial; but after verdict we must understand that that was not the fact.

Per Curiam

Rule discharged.

Tuesday,
April 16th.CHRISTIE *against* SECRETAN.

A sentence of a foreign Court of Admiralty is only conclusive here, in an action on a policy of assurance, as to the express ground of the sentence, but not as to any of the premises (noticed in the consideration part of the sentence) that led to the adjudication.

THIS was an action upon a policy of assurance on goods on board the ship *The Peggy* of *George Town* on a voyage from *Maryland* and *Virginia*, both or either, to *Bremen*. The defendant subscribed the policy as an underwriter for 200*l.* on the 31st of *May* 1797, and on the 2d of *June* 1797 subscribed the following memorandum written on the policy *viz.* "The destination of the *Peggy* having been altered, we agree to stand our respective risks on the goods insured on this policy *per The Mercury*, direct from *Virginia* to *Bremen*." There were counts in the declaration for a total loss by capture of the goods on board the said ship *Mercury*, and for expences incurred in the suit of the plaintiff in and about the recovery of the property insured; for money paid laid out and expended; and for money had and received. The defendant pleaded the general issue; and on the trial at Guildhall at the Sittings after last *Trinity* term before Lord *Kenyon* the Jury found a verdict for the plaintiff, subject to the opinion of this Court on the following case.

The ship *Mercury*, on board of which the goods insured were shipped in *Virginia*, was in fact an *American* ship, and had on board at the time of her sailing on the voyage insured and from thence until and at the time of the capture hereinafter mentioned

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all such papers and documents indicating her to be an *American* as are usually carried on board *American* ships, or which the *French* themselves deemed necessary in former voyages. There was also on board a muster-roll, but it was not signed or certified by any public officer of the place from which the ship sailed. There was not any warranty made to the defendant or any other underwriter upon the subject; on the contrary the broker, though he spoke of the ship as an *American* ship, told the underwriters that he was directed not to warrant any thing. On the 20th of *May* 1797 the ship sailed with the goods on board from *Virginia* on the voyage insured, and on the 22d of *June* following was captured by a *French* privateer, *The Hydra*, and taken into *Nantes*. Proceedings were then instituted before the Tribunal of Commerce of the canton of *Nantes*, and in 1797 the following sentence was pronounced by that Court;—

“Considering the disposition of the first article of the law of the 3d *Brumaire* 4th year, enacting that whenever a declaration of war with any nation shall give rise to the fitting out of privateers the Executive Directory shall prescribe such clear and precise instructions, the terms whereof will not leave any doubt for the searching of vessels with regard to their duty and rights, and these instructions are made known by its decree of the 12th *Ventose* thereon following; considering that in the fourth article of the said decree it is clear and precise; it declares good prize all *American* ships which shall not have on board a muster-roll in due form, such as is prescribed by the form annexed to the treaty of the 6th of *February* 1778; considering that the muster-roll of the ship *Mercury* is not conformable to the forms prescribed by the treaty of the 6th of *February* 1778, or that ordered by the decree of the 12th *Ventose*, it being neither dated nor signed by any public officers of the United States; considering that the bill of lading of the 255 hogsheads of tobacco, which was found on board, not being signed by the captain is contrary to the 6th article of the 9th title of the Marine Ordinances, whereby it is declared that all such vessels on board whereof no charter-party, bills of lading, or invoices, are found shall be deemed good prizes together with their cargoes, as also the 9th regulation of the regulation of the 21st *October* 1744, whereby it is enacted that all bills of lading found on board not being signed shall be null and considered as imperfect; that besides the 255 hogsheads of tobacco there were
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loaden on board the ship *Mercury* about 6000 pieces of small timber of which there is neither bill of lading nor invoice; considering that the captain has not produced any *American* protection, and that according to the declaration of *Abna Zathan* mariner it appears that the said captain is an *Irishman* and that he has a wife and two children in *Ireland*;—The tribunal in conformity to the above-recited law adjudges and declares the validity of the prize of the ship *Mercury* of the burthen of about 183 tons, with all furniture tackle implements and appurtenances; and likewise adjudges and declares the validity of the prize of the goods and effects whereof the lading and cargo of the said ship *Mercury* consists; and all that for want of the dispatches and sea-papers of the said captain being in regular order; on which account she is looked upon as belonging to the enemies of the *French Republic*; the same being agreeable to the seventh article of the *Marine Ordinances of August 1681*." The counsel of each party are with permission of the Court at liberty to refer upon the argument of this case to the proceedings at large in the said Tribunal of Commerce and to the printed copy of the treaty made between *France* and *America* on the 6th of *February 1778*.

This case was twice argued, in *Hilary* term last by *Giles* for the plaintiff and *Park* for the defendant, and now by *Law* for the former and *Gibbs* for the latter.

On the part of the defendant it was objected that there was an implied warranty in every contract of assurance that the ship should be navigated according to the laws of the country to which she belongs and to which she was going; *Law v. Hollingworth*, ante, 7 vol. 160, and *Farmer v. Legg*, ib. 186. That though there was no warranty that this was an *American* ship, yet that being in fact *American* she ought to have had all those documents that are necessary for the protection of an *American* ship, whether required by the law of nations or particular treaties, because the want of any one of them subjected the ship to additional risks. That by the treaty between *America* and *France* this ship ought to have had a muster roll (a) on board properly signed &c; that that was so decided by the sentence of the *French Court of Admiralty* which was conclusive here; and that for the want of a proper muster-roll she had been condemned.

(a) See ante, 7 vol. 687 &c, the parts of the Treaty between *America* and *France* and the Ordinances of *France* on this subject.

It was answered, on the part of the plaintiff, that the argument urged on the other side tended to shew, contrary to all the decisions upon this subject, that there was no difference between a policy with and without a warranty; that a warranty was perfectly useless. That, if it were necessary for a ship to have any documents on board, she need only have those that are required by the laws of the country from and to which she sails, and that as this ship was not bound to any port in the *French* dominions, it was only necessary that she should have on board those documents that are required by the treaty between *France* and *America*. That if this were otherwise this ship had in fact every document that is required by the treaty between *France* and *America*: but that it was not necessary for her to conform to the arbitrary and capricious ordinances of *France* not warranted by, but contrary to, the treaty between *America* and *France*. That the sentence of the *French* Court of Admiralty being only a proceeding in rem was not conclusive here in an action on a policy of insurance as to the grounds of the sentence. [But this proposition was denied by the Court, and was given up in the course of the argument.] That the sentence, if conclusive here as to the premises which led to its conclusion, did not decide this case; it appearing by the sentence itself that the ship had been condemned not for want of a muster-roll, as required by the treaty between *France* and *America*, but merely for want of such a muster-roll as is required only by a ordinance of *France*, which ordinance is not binding on *America*.

Minute comments were made by the counsel on both sides on the different parts of the sentence of the Court of Admiralty; on the one hand to shew that the foundation of the sentence was the want of the muster-roll required by the treaty between *France* and *America*; on the other hand to prove that the foundation of it was the want of the muster-roll required by the *French* ordinance. And the following cases were referred to; *Bernardi v. Motteux*, Dougl. 574; *Mayne v. Walter*, E. 22 Geo. 3. B. R. Park 414; *Barzillay v. Lewis*, ib. 410. Tr. 22 Geo. 3. B. R.; *Saloucci v. Woodmass*, ib. 413. H. 24 Geo. 3.; *Saloucci v. Johnson*, ib. 415. Tr. 25 Geo. 3.; *De Souza v. Ewer*, Guildh. Sitt. after Hil. 1789; *Calvert v. Bovill*, ante, 7 vol. 523; and *Geyer v. Aguilar*, ib. 681.

Lord KENYON Ch. J. In deciding this case I do not mean to break in upon the authority of those cases in which it has been de-

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terminated that the ship insured must be sea-worthy, that she must have a proper crew and pilot, and that she must be navigated not only according to the law of nations but also according to the particular treaties that subsist between the country to which the ship belongs and other countries. But the ground on which my opinion is formed in this case is a very short one. In general there is no doubt but that the sentence of a Court of Admiralty is conclusive as to the points which it professes to decide: it was so ruled in the case of *Hughes v. Cornelius* (a), and that has been acknowledged to be law ever since. But the sentence of such a Court is only conclusive on the points which it professes to decide; and the only question here is what point the Court of Admiralty has decided. Now the sentence recites many facts into which it is not necessary to inquire; but the sole reason given for the adjudication, at the concluding part, does not affect the case before us. The *French* Court of Admiralty did not condemn the ship and cargo for a non-compliance with the treaties that subsisted between *France* and *America*: if they had condemned the ship and cargo for having violated any such treaty, we should not have been able to extricate ourselves from the effect of such a sentence. But the short ground on which I proceed in this case is that the condemnation by the *French* Court of Admiralty is expressed towards the conclusion of it to be because "the ship belonged to the enemies of the *French* Republic." We cannot now inquire whether *France* and *America* were at enmity with each other: the foundation of this sentence is that the prize belonged to the enemies of the *French* Republic. The *French* Court of Admiralty did not condemn the ship and cargo because the ship had not the proper documents on board: but after stating a variety of matter they at length arrived at this conclusion (whether rightly or not we cannot inquire) that the ship belonged to the enemies of the *French* Republic: but that does not deliver the underwriters from their responsibility on this policy of assurance. If there had been a warranty that the ship was an *American*, then this sentence would have shewn that the warranty had not been complied with: but there being no such warranty, I am of opinion, for the reason before given, that the plaintiff is entitled to recover.

GROSE J. This is an action for an indemnity for the loss of goods that were insured on board the ship *Mercury*, which was an *American* ship having on board all necessary papers indicating her

(a) 2 Show. 232.

to be an *American*; she had on board a muster-roll, though it was not signed or certified by any public officer; it also appears by the case that there was no warranty that the ship was an *American*, but that on the contrary the broker refused to warrant her to be an *American*: under these circumstances, the loss having been proved, it throws on the underwriter the burden of shewing some reason why he should not be responsible for the loss; the reason assigned is that the ship was lost by the negligence of the owner in not having on board the roll-d'equipage, and that she was condemned by the *French* Court of Admiralty on this ground. I agree with the defendant's counsel that it was necessary for the ship to have all those documents on board that an *American* ship ought to have; I also agree that the not having them on board is such negligence in the owner of the ship as will excuse the underwriter; and if the ship had been condemned for the want of any such papers, it would have been conclusive in favor of the insurer. Now, in order to prove that the ship in question had not all those documents that an *American* ship ought to have, the defendant's counsel have referred to the sentence of condemnation: but in considering that, we can only look at the ground of the sentence itself and not at the previous reasons which are there stated; and the express ground of adjudication is that the ship belonged to the enemies of the *French* Republic: but that does not negative any fact or any circumstance that the plaintiff was bound to prove in order to maintain his action against the underwriter.

LAWRENCE J. The counsel in arguing this case were led to the discussion of many points that it is not necessary for us to determine. At the same time I think that on the former argument many things were taken for granted to which I cannot assent. Among other things it was said that the ship insured must be navigated according to the laws of the country to and from which she sails: but I rather think that that proposition is not supported in its extent by the cases. It is true that if the assured bring an action here on a policy of assurance, effected contrary to the laws of this country, he cannot recover: but I do not know that the cases have gone farther, and decided that no action can be maintained here on a policy of insurance made contrary to the revenue laws of another country (a). I also doubt whether there is any analogy between a case like the present and cases where there is an

(a) Vid. *Holman v. Johnson*, Cowp. 341; and *Biggs v. Lawrence*, ante, 3 vol. 454.

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implied warranty of sea-worthiness. The latter is implied from the nature of a contract of insurance. The consideration of an insurance is paid in order that the owner of a ship, which is capable of performing her voyage, may be indemnified against certain contingencies; and it supposes the possibility of the underwriter gaining the premium: but if the ship be incapable of performing her voyage, there is no possibility of the underwriter's gaining the premium; and if the consideration fail, the obligation fails. In the case of the *Mills* frigate (a) it was said that the ship's being capable of performing the voyage was the substratum of the contract of assurance. So if a ship sail without a sufficient crew, she is incapable of performing her voyage. But that is not the case of a ship not having proper documents on board; she may nevertheless perform her voyage; at least there is no certainty that she will not, as there is in the other cases above alluded to. I have merely thrown out these doubts in consequence of what fell from the counsel on the first argument, without meaning to give any decisive opinion upon these points. It has been contended however on the part of the defendant that the ship in question was condemned for not having on board those papers that are required by the treaty between *France* and *America*; and if that had been the express ground of the sentence of the Court abroad, I should have felt great difficulty in resisting its effect as applied to this action: but that is not the ground of their decision. They have stated many things that induced them to draw the conclusion that she was the property of an enemy; but that is the ground of the sentence. In considering a foreign sentence lately in an action on a policy of assurance this Court said that they could not examine the premises that led to the conclusion of that sentence: so here, we must consider the sentence itself as conclusive on that point, but we need not examine the premises that led to that conclusion; and the ground of condemnation is that the ship belonged to the enemies of the Republic. For this reason therefore, without giving any decisive opinion upon the other topics that have been discussed, I concur with the rest of the Court in the judgment given.

Postea to the plaintiff.

(a) *Park*, 252, &c.

COPLAND and Others, Assignees of GINGER, a Bankrupt,
against STEIN and Others.

Tuesday,
April 16th.

THIS was an action of assumpsit for money had and received by the defendants for the use of the plaintiffs as assignees, to which the general issue was pleaded; and at the trial at the sittings after last *Trinity* term at *Guildhall* a verdict was found for the plaintiffs for 848*l.* 16*s.* 11*d.*; subject to the opinion of this Court on a case reserved.

In *October* 1796 Mr. *Macfarlane*, as broker to the bankrupt, applied to the defendants to advance a sum of money upon the credit of a quantity of salt, which he offered to consign to them as factors to sell on account of *Ginger*, which was then said to be deposited in a warehouse rented by the bankrupt, and which had been consigned to him by different ships. To induce the defendants to advance the money, and to impress them with a belief that the quantity of salt was sufficient to cover the sum *Macfarlane* applied for, he delivered to them a paper in the handwriting of the bankrupt, and signed by him as a correct account of the salt according to the best of his knowledge and belief, making it appear to amount to 439 tons and 4 bushels. After some communication between the parties the defendants agreed to advance 3550*l.* to the bankrupt on the consignment of 350 tons of this salt to them for sale on his account, upon his making a regular invoice thereof containing an authority for such sale. In consequence of this agreement the bankrupt on the 24th of *October* 1796 made out this Invoice; "Invoice of 350 tons *Liverpool* salt, consigned to Messrs. *Stein, Smith* and Co. by *Richard Ginger*, to be sold by them for his account. *London* 24th of *October* 1796, 350 tons *Liverpool* salt in bulk at 13*l.* 15*s.*—4812*l.* 10*s.* Errors excepted, *Richard Ginger*." This invoice was transmitted by the bankrupt to the defendants inclosed in the following letter, signed by the bankrupt; "Messrs. *Stein, Smith* and Co. *London*, I beg leave to hand your invoice of 350 tons salt, which you will please to receive and dispose of for my account, and pass the proceeds to my credit. As I shall want money before the salt can be sold, I will be obliged to you for acceptance of such dates as can be agreed on; and I hereby promise to keep you free of advance." On the 29th of *October* 1796 *Macfarlane* as the bank-

A trader after a secret act of bankruptcy consigned goods to a factor, who agreed to advance money thereon, and accordingly accepted and paid bills drawn on him by the trader; a commission afterwards issued against the trader on such prior act of bankruptcy, after which the factor sold the goods and received the money: held that he was answerable to the assignees for the value of the goods.

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rupt's broker delivered the key of the warehouse in which the salt was deposited to the defendants; and on the 31st of that month they advanced the bankrupt by the hands of *Macfarlane* 1000*l.*, and they at the same time delivered to him bills of exchange drawn by their house at *Leith* and accepted by them to the amount of 2000*l.* more, which bills are as follows; viz. two bills dated 29th *October* at three months date for 500*l.* each, and five other bills of the same date payable two months after date for 150*l.* 175*l.* 200*l.* 230*l.* 245*l.* making in all 2000*l.*; and the defendants on the 5th of *November* 1796 accepted one other bill for the bankrupt dated 31st of *October* at three months, for 550*l.* more, making the whole of their advances and acceptances 3550*l.* On the 10th of *November* 1796 the defendants' clerk went to the warehouse to look at the salt, when he found that there was not above one-fourth of the quantity mentioned in the invoice; upon the defendants being informed of this, inquiry was immediately made after the bankrupt to account for the deficiency, who not giving the defendants the satisfaction they required, and they conceiving that a fraud had been practised on them by the bankrupt and *Macfarlane*, writs were issued against them both at the suit of the defendants, upon which they were arrested, and there was found upon *Macfarlane* the defendants' acceptances to the amount of 1625*l.* which were given up; and the remainder were duly paid by the defendants making their advances on the credit of the salt 1925*l.* On the 25th of *August* 1796 *Ginger* committed an act of bankruptcy unknown to the defendants; and he continued publicly in the management of his business until after the defendants advanced him the money and bills before mentioned. On the 12th of *November* 1796 a commission of bankrupt was awarded and issued against *Ginger*, under which he was declared a bankrupt on the 18th of the same month, and his effects assigned to the plaintiffs. In pursuance of an agreement entered into by the attornies for both parties, the salt has been sold, and consisted of 76 tons and a fraction, which netted upon sale 848*l.* 16*s.* 11*d.* which has been paid into the hands of the defendants for the use of those who are entitled to it; and the question is, whether the plaintiffs or defendants be entitled to that sum? the verdict to be entered accordingly.

It was mutually agreed that no advantage should be taken of the form of the action in this case, which had been settled by consent to try the question on the bankrupt laws.

The



The case was argued in the last term by *Wood* for the plaintiffs and *Perceval* for the defendants; and now by *Erskine* for the former, and *Gibbs* for the latter.

*For the plaintiffs* it was contended that by the words and spirit of the bankrupt laws all the property of a bankrupt, including debts due (a) to him as well as moveable goods and chattels, vests by relation in his assignees from the time of the act of bankruptcy committed by him, unless in the particular cases excepted by the statutes 1 Jac. 1. c. 15. s. 14. 21 Jac. 1. c. 19. s. 14. and 19 Geo. 2. c. 32. s. 1. And by the first section of the 21 Jac. 1. c. 19. it is expressly enacted that "all the statutes and laws theretofore made against bankrupts, and for relief of creditors, shall be in all things largely and beneficially construed and expounded for the aid, help, and relief, of the creditors, &c." The first exception, which is in the 1 Jac. 1. c. 15. s. 14. is, "that no debtor of the bankrupt be thereby endangered for the payment of his debt truly and bona fide to any such bankrupt before such time as he shall understand or know that he is become a bankrupt." But that clause cannot apply to the present case, as the defendants were creditors and not debtors of the bankrupt: there was nothing in the transaction which could constitute a debt from them to him, for the salt which was pledged to them was not sold until after the commission issued; and the exception in the statute must be confined to payments made by such as were debtors to the bankrupt at the time of the secret act of bankruptcy: but where the whole transaction arises afterwards, the party cannot be considered as a debtor of the bankrupt, because by relation the goods sold which created the debt were at the time of the sale the property of the assignees. The next exception, which is by 21 Jac. 1. c. 19. s. 14. applies to purchasers from the bankrupt for valuable consideration under certain circumstances not affecting this case. Lastly, the third exception, made in the statute 19 Geo. 2. c. 32. s. 1., is equally inapplicable to this case; for that is specially limited to payments made by bankrupts to their creditors *for goods sold*, or *on bills of exchange* drawn, negotiated, or accepted, by such bankrupts. But secondly, even if the statute of the 1st of James were to receive a larger construction than the words themselves imply, and if it extended to persons who became debtors to the bankrupt after the act of bankruptcy committed, still it would

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(a) Vid. 1 Jac. 1. c. 15. s. 13.



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not protect these defendants who were only *factors* and not purchasers of the goods. The goods were not sold, but only pledged, to them by the bankrupt; therefore in no sense could they be *debtors* to him. The transaction was a mere mortgage, which is not within the protection of the statute: and the defendants are still less entitled to favour than a common mortgagee; for they were to get commission as well as interest for the money advanced by them. Neither can it be contended here that the defendants as factors had a lien on these goods in respect of the bills accepted and paid by them; for a factor can only have a lien on the goods of his principal, but the salt was the property of the assignees, who were strangers to the transaction.

*For the defendants* it was argued that the rule of relation in the bankrupt laws, having been adopted to prevent fraud, ought not to be used as a mean to enable the assignees to commit fraud by retaining both the money of the defendants and the goods in respect of which such money was advanced. And, admitting that the assignees had an option to affirm or disaffirm the bankrupt's contracts, they should be put to their election, and the transaction if disaffirmed in part should be rescinded in toto; which could only be done in this instance by the assignees repaying the money advanced on the salt, and taking the salt back again. The case in question falls, if not within the letter yet, within the spirit of the exceptions in the 1 *Jac.* 1. and 19 *Geo.* 2.; and the Court in expounding those clauses will consider that they were introduced as just and reasonable exceptions to the severity of the bankrupt laws, and that they are therefore to be construed liberally and beneficially, and to include cases standing in *pari ratione*. On this principle the Court will not restrain the word *debtor* in the statute of *James* to one who is a debtor at the time of the act of bankruptcy only, but will extend it to such as become debtors at any time afterwards before the issuing of the commission and without notice of any act of bankruptcy; for the hardship is the same, and the reason of the exception extends equally to both. But if this were doubtful upon the words of that act, the meaning of these words is explained by the Legislature in the subsequent act of the 19 *Geo.* 2. made in *pari materiâ*; in the preamble of which it is recited that traders frequently commit secret acts of bankruptcy unknown to their creditors and others with whom in the course of trade they have dealings and transactions, and still continue to appear publicly and carry on their trade and dealings by



by buying and selling goods, negotiating bills of exchange, and paying and *receiving money* on account thereof in the usual way of trade, in the same open manner as if they were solvent &c. The act then proceeds to provide for part of the mischief before recited, namely, that creditors receiving money for goods sold by the bankrupt or in respect of bills of exchange, without notice of the act of bankruptcy, shall not be obliged to refund the money to the assignees. It is evident from the wording of the preamble that the Legislature considered that they had before made provision by the 1 Jac. 1. for all payments made to the bankrupt on account of goods or receipts of money by him in that respect, otherwise when they recited the mischief they would have proceeded to give the same remedy as in the other cases specified: and if the two statutes be expounded together as making one law, and the preamble and enacting parts of both be incorporated together, it will then appear that the Legislature, after reciting the very mischief which has happened in the present case, and extending the remedy to all debtors of the bankrupt without notice of the act of bankruptcy, necessarily meant to include this case, which is where the defendants by accepting the goods from the bankrupt became debtors to him to the amount of the value when sold, and in respect thereof may fairly be considered as having by their acceptance and subsequent payment of his bills made a payment of so much to him on account within the meaning of the act of *James*; but the effect of this action is to compel the defendants to pay the value of the goods again to the assignees. In *Drinkwater v. Goodwin* (a) a factor who had become surety for his principal was adjudged to have a lien on the price of goods sold by him for his principal, although the money was not received until after the bankruptcy of the principal, and a commission taken out and notice from the assignees to the defendant, the purchaser, not to pay it to the factor. But the case nearest in point to the present is that of *Foxcroft and others assignees of Satterthwaite v. Devonshire and others* (b): that which was an action of assumpsit for money arising from the sale of goods consigned by the bankrupt to the defendants, and sold by them as factors, in respect of which, the defendants had made payments to the bankrupt on account: but it appeared that *Satterthwaite* had committed secret acts of bankruptcy prior to the whole of the transaction; and the prin-

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(a) *Coop.* 251. (b) 2 *Burr.* 931. 1 *Blac. Rep.* 193; and also cited from a MS. of *Tates J.*



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by buying and selling goods, negotiating bills of exchange, and paying and *receiving money* on account thereof in the usual way of trade, in the same open manner as if they were solvent &c. The act then proceeds to provide for part of the mischief before recited, namely, that creditors receiving money for goods sold by the bankrupt or in respect of bills of exchange, without notice of the act of bankruptcy, shall not be obliged to refund the money to the assignees. It is evident from the wording of the preamble that the Legislature considered that they had before made provision by the 1 Jac. 1. for all payments made to the bankrupt on account of goods or receipts of money by him in that respect, otherwise when they recited the mischief they would have proceeded to give the same remedy as in the other cases specified: and if the two statutes be expounded together as making one law, and the preamble and enacting parts of both be incorporated together, it will then appear that the Legislature, after reciting the very mischief which has happened in the present case, and extending the remedy to all debtors of the bankrupt without notice of the act of bankruptcy, necessarily meant to include this case, which is where the defendants by accepting the goods from the bankrupt became debtors to him to the amount of the value when sold, and in respect thereof may fairly be considered as having by their acceptance and subsequent payment of his bills made a payment of so much to him on account within the meaning of the act of *James*; but the effect of this action is to compel the defendants to pay the value of the goods again to the assignees. In *Drinkwater v. Goodwin* (a) a factor who had become surety for his principal was adjudged to have a lien on the price of goods sold by him for his principal, although the money was not received until after the bankruptcy of the principal, and a commission taken out and notice from the assignees to the defendant, the purchaser, not to pay it to the factor. But the case nearest in point to the present is that of *Foxcroft and others assignees of Satterthwaite v. Devonshire and others* (b): that which was an action of assumpsit for money arising from the sale of goods consigned by the bankrupt to the defendants, and sold by them as factors, in respect of which, the defendants had made payments to the bankrupt on account: but it appeared that *Satterthwaite* had committed secret acts of bankruptcy prior to the whole of the transaction; and the prin-

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(a) *Coop.* 251. (b) 2 *Burr.* 931. 1 *Blac. Rep.* 193; and also cited from a MS. of *Fares J.*



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principal question was, how far those payments were protected under the bankrupt laws. It is true that the case turned principally on the ground of a misdirection of the Judge who thought the transaction was fraudulent within those laws; but Lord *Mansfield* in giving judgment expressly said, that if it appeared to the Court clearly that on the whole no injustice had been done to the defendants by the verdict against them, or that the plaintiffs by another form of action could recover all that they had got by the verdict, they would not interfere, though they thought the ground of the verdict wrong. The Court therefore by granting a new trial did expressly determine upon the right of the defendants as factors to retain the price of the goods in their hands to indemnify themselves for the payments made to their principal on account, though after a secret act of bankruptcy committed by him.

In reply; to the case of *Drinkwater v. Goodwin*, it was answered that there the goods were put into the hands of the factor and sold by him before any act of bankruptcy committed by the principal, and consequently when he had a full right to bind the property. As to *Foxcroft v. Devonshire*, it was observed that, so far as the point in judgment went, it did not affect this question; for it only decided that such a transaction without notice of the bankruptcy was not a fraud in law; that though Lord *Mansfield* delivered an obiter dictum in favour of the defendants, the question did not appear to have been fully considered; for the defendants were supposed to be protected under the 19 *Geo. 2.*, which clearly does not apply to such a case; and the question was neither argued nor decided upon its true ground, namely, the positive provisions of the Statute Law. But that at any rate the opinion, however respectable, could not outweigh the clear words of the bankrupt laws: nor could any argument of hardship prevail against them, as was said by the Court in *Bradley v. Clark* (a).

Lord KENYON Ch. J. This case, when duly considered, is not a case of difficulty. We ordered the second argument not on account of any difficulty that this case itself presented to the Court: but the case of *Foxcroft v. Devonshire* was pressed upon us on the former argument as a decision directly in favor of the defendants; and that case is involved in so much obscurity that when it was cited we did not immediately see how far it applied to the case before us: but, having since had an opportunity of examining that case,

(a) *Ante*, 5 vol. 197.

we find that there was no point there decided that will clash with our opinion in this case. It appears that that case was not thoroughly understood on the first trial, and all that was there judicially decided by this Court was that a new trial ought to be granted in order that the case might be more fully investigated. It is true indeed that some expressions there dropped from Lord *Mansfield* favorable to the argument of the defendants in this case: but even if such had been his judicial opinion, we must have examined the grounds of it, and after paying every attention that is due to the opinion of so great a man we must have decided according to the provisions of the statutes alluded to.

A decision in favor of the defendants in the present action would be contrary to all the bankrupt laws and to the cases that have been determined upon them on the ground of relation back to the act of bankruptcy. I will not now inquire whether or not the Legislature acted wisely in framing those laws, nor can we decide here on the hardship of a particular case: many great men have doubted of the propriety of the whole of the bankrupt laws; but as long as they remain in force we are bound to conform to them. The doctrine of relation obtains universally through all the bankrupt laws, except in the cases that are particularly excepted; and this case does not come within either of those exceptions. The argument of the defendants goes the length of asserting that if a bankrupt after a secret act of bankruptcy sell or mortgage his estate, such sale or mortgage will be valid. It is true that if no commission be taken out for five years after the act of bankruptcy committed such sale would be good; there is a statute (a) limitation in such a case; but in no other case can such a sale be protected. In the present case the goods were delivered in *October* 1796, but now it appears that the bankrupt by having committed a secret act of bankruptcy two months before was incapacitated from disposing of these goods to the prejudice of his creditors at large: this is a hard case on the part of the defendants, but we are compelled to decide against them by positive law, and can only say *ita lex scripta est*.

GROSE J. The facts in this case are shortly these; the defendants after a secret act of bankruptcy committed by *Ginger* received goods from the bankrupt, and advanced money on them; a commission of bankrupt was afterwards taken out; the goods were then sold, and the money is in the hands of the defendants. And

(a) Stat. 21 Jac. I. c. 19. s. 14.

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the question is whether or not this money by law belongs to the assignees of the bankrupt. In this case some propositions are clear; the goods, when they came into the hands of the defendants, belonged to the assignees; they were delivered to them to be sold on the bankrupt's account without the authority of the assignees; in the hands of the defendants they were still the goods of the assignees, unless there be any law to alter the property. After the goods were sold, the produce of them belonged to the assignees, unless there be any law to warrant the defendants to sell the goods without the authority of the owners, and when they had sold them to put the money into their own pockets. As a mere naked case between *A.* and *B.*, unmixed with the fact of bankruptcy, the law is clear; for my goods in the hands of another I may maintain trover, and for the produce of them an action for money had and received.

The question then is whether or not the law, either by positive words or by the construction put upon them, enables the defendants to retain this money against the assignees. It is said that they may retain the money; 1st, As factors; 2dly, On the true construction of the stat. 1 Jac. 1. c. 15, or on that of the 19 Geo. 2. c. 32.; or on the construction of both of them moulded together and considered as one law; and it was also contended that the case of *Foxcroft v. Devonshire* is expressly in point to this purpose. First then, can the defendants retain this money as factors? As factors of whom? of the bankrupt; the goods were not his, but belonged to the assignees, and the defendants were not the factors of the assignees. If the defendants had received the goods before the bankruptcy of *Ginger*, there might have been a lien, and this case would have been like that of *Drinkwater v. Goodwin* which was referred to in the argument. But the present case is distinguishable from that; there the factor received the goods of the bankrupt before the act of bankruptcy, and when they belonged to the bankrupt: here the goods were received by the defendants from the bankrupt after the bankruptcy, when they belonged to the assignees; and I know of no case which gives a factor a lien on goods sent to him by a person to whom the goods do not belong. Then, secondly, is this a case within the stat. 1 Jac. 1. c. 15., which enacts that no debtor of the bankrupt shall be endangered for the payment of his debt to a bankrupt before he shall understand or know that he is become a bankrupt? Certainly not. Here was no payment of any debt to the bankrupt; the money advanced by the defendants was a loan to the bankrupt; it was
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advanced after he became a bankrupt, and the defendants were in no wise his debtors; so that this case in no respects falls within the proviso. Nor does the case come within the other statute, 19 Geo. 2. c. 32. The proviso in the stat. 1 Jac. 1. was made to protect *debtors*, this proviso was introduced for the protection of *creditors* in respect of goods really and bonâ fide sold to such bankrupt in the usual and ordinary course of trade and dealing from the repayment of such money as such creditors had really and bonâ fide and in the usual and ordinary course of trade and dealing received. In this case no goods were sold to the bankrupt, nor was any money received by the defendants as creditors of the bankrupt: the goods were sent to be sold by them, but were not sold to them; and therefore this case does not come within this statute. But then we are desired to read the proviso in the stat. 1 Jac. 1. after the recital in the stat. 19 Geo. 2. It is new to read a preamble or a recital in a subsequent statute to explain a former act; and if the Legislature had intended that it should be so explained in this instance, a very few words in the latter statute would have answered the purpose. However I will read the two together; the preamble in the 19 Geo. 2. is this; "Whereas many persons within the description of and liable to the statutes concerning bankrupts frequently commit secret acts of bankruptcy unknown to their creditors and other persons, with whom, in the course of trade, they have dealings and transactions, and after the committing thereof continue to appear publicly and carry on their trade and dealings by buying and selling of goods and merchandizes, drawing, accepting, and negotiating bills of exchange, and paying and receiving money on account thereof, in the usual way of trade, and in the same open and public manner as if they were solvent persons, and had not become bankrupts; and whereas the permitting such secret acts of bankruptcy to avoid and defeat payments really and bonâ fide made in the cases and under the circumstances abovementioned, where the persons receiving the same had not notice of, or were privy to, such persons having committed any act of bankruptcy, will be a great discouragement to trade and commerce, and a prejudice to credit in general:" then the proviso in the stat. 1 Jac. 1. c. 15. is, "That no debtor of the bankrupt be hereby endangered for the payment of his debt truly and bonâ fide to any such bankrupt before such time as he shall understand or know that he is become a bankrupt." But

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the answer to the argument derived from that mode of reading the statutes is that the defendants in this case were not debtors to the bankrupt; that it is not contended that the bankruptcy is to avoid or defeat any payments made to the bankrupt for goods or on the acceptances of bills of exchange: it is only contended that the bankruptcy is to vest the property of the goods in the assignees, and thereby avoid any right supposed to be vested in the defendants by the bankrupt's selling these goods, and prevent the defendants having any lien upon them in consequence of any act of the bankrupt after he became a bankrupt. I had very little doubt on this case when it was argued in the last term, but I was not then prepared to answer the case of *Foxcroft v. Devonshire* which was represented to us as decisive of the present: but having since had an opportunity of considering that case, I think it does not apply to this. The question that has been agitated in this case was not raised there: it might have arisen, but was not made at the trial; the case below was mistaken; it was left to the jury on the ground of fraud, but this Court thought that there was no fraud in law, and they granted a new trial for the purpose of having the case further considered. Therefore I am of opinion that that case is no authority for the present.

LAWRENCE J. The only thing that raised any doubt in the minds of the Court on the first argument was the case of *Foxcroft v. Devonshire*; but on looking into that case it appears not to be applicable to the present. It has been decided in a variety of cases that the legal effect of an act of bankruptcy is to enable the assignees, when a commission is sued out, to rescind all the contracts made by the bankrupt after the act of bankruptcy committed, and that relation takes place in all cases except the three that have been alluded to in the argument, and which are excepted by the different statutes. This does not appear to me to be one of those excepted cases; it was a loan of money after the act of bankruptcy committed; and therefore the assignees are entitled to recover in this action.

Postea to the plaintiffs.

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Wednesday,
April 17th.The KING *against* G. GASKIN, D.D.

THE defendant, the rector of the united parishes of *Saint Bennet* otherwise *Benedict Gracechurch* and *Saint Leonard Eastcheap* in *London*, having been called upon by a mandamus to restore *John Fulbrook* to the office of parish-clerk of the said united parishes, made a return to the mandamus in which he assigned several causes for the removal of the clerk. After enumerating the different causes which shewed the indecent and indecorous conduct of the clerk on several occasions, and among others that the clerk was on a certain day intoxicated during divine service and incapable of performing his office and that he officiated in an improper part of the church, the return concluded thus, that "for and on account thereof in the presence of the said *J. Fulbrook* and also in the presence of the churchwardens of the said united parishes I did as such rector as aforesaid remove and dismiss the said *J. Fulbrook* from his place and office of parish-clerk &c."

A return (to a mandamus to restore) insufficient, because it did not state that the party had been summoned to answer to the charge before he was removed.

Jervis took several objections to the return: but it is only necessary to mention one, on which the Court adjudged that the return was insufficient, namely, that it did not appear that *Fulbrook* had ever been summoned to answer before he was removed, and consequently that he had had no opportunity of making any defence to the charges brought against him.

Park, in answer to this objection, relied on several cases;
1. *Rex v. The Mayor &c of London* (a), where the Court refused to grant a mandamus to restore *P. Roberts* to an office from which he had been suspended without having had notice to make his defence, it appearing that there was good ground for the suspension.
2. *Rex v. The Mayor &c of Axbridge* (b), where a mandamus to restore was refused for a similar reason. 3. *Rex v. Tidderley* (c), where the same point was determined on a return to a mandamus. There the mayor returned (to a mandamus to restore *Tidderley* to the office of a burghess of a corporation) that he had removed *Tidderley* at his own request; an objection was taken to the return, and the Court said that though the return was insufficient, yet as it appeared that the party had no cause to be restored they would not restore him; and so (they said) it was ruled in *Winchester's* case.
4. *Rex v. The Mayor &c of London* (d); where an objection, taken

(a) *Ante*, 2 vol. 177.(b) *Cowp.* 523.(c) 1 *Sid.* 14.(d) *M.* 26 *Geo.* 3. *B. R.*

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to a return to a mandamus to restore Mr. *Wooldridge* to the office of alderman that it was not stated that the alderman had notice to defend himself but only that he had been summoned to attend in his place as alderman, was over-ruled.—Besides which (it was contended that) in this case it must be understood that the clerk was not condemned unheard, it being stated in the return that Doctor *Gaskin* “in the presence of the said *J. Fulbrook*” &c removed him &c. That the facts returned must be taken to be true; for if false, the clerk may have his action for a false return; and if true, he ought not to be restored for a mere informality, because the instant he is restored Doctor *Gaskin* may again remove him in a more formal manner.

Lord KENYON Ch. J. If we were to hold this return to be sufficient, we should decide contrary to one of the first principles of justice, *audi alteram partem*. The two first cases cited in support of this return by no means warrant the position for which they were cited; there the application was for a mandamus to restore; and on hearing the whole case this Court refused to grant the writ because it appeared on the party's own shewing that he ought to have been removed. In the next case cited the party must have had notice, because it appears that he was removed at his own request. And in the last case Mr. *Wooldridge* was summoned to attend in his place as alderman, which perhaps was considered as equivalent to formal notice. It is to be found at the head of our criminal law that every man ought to have an opportunity of being heard before he is condemned: and I should tremble at the consequences of giving way to this principle. I have no doubt but that Doctor *Gaskin* has acted on this occasion from the best motives; and notwithstanding our decision he will be perfectly justified in renewing his accusation against this person and in removing him from his office in a more formal manner if the charge be true.

GROSE J. The offences charged on the clerk are abundantly sufficient to warrant Doctor *Gaskin* in removing him: but the present proceeding is informal, and the return to the mandamus is insufficient.

LAWRENCE J. This was one of the grounds on which the return in *Bagg's* case (a) was holden to be insufficient.

The Court therefore awarded a peremptory mandamus to restore *Fulbrook*.

(a) 11 Co. 99. a.

DOE on the several demises of JAMES GREGORY and
DIONES GEERE *against* JOHN WHICHELO.

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Friday,
April 19th.

THIS ejectment was brought on the demise of *J. Gregory* as to one undivided third part of certain premises in *Suffex*, and on the demise of *D. Geere* as to another undivided third part. At the trial at the last assizes for *Suffex* a verdict was found for the plaintiff, subject to the opinion of this Court on the following case.

Elizabeth Lemmon widow, being seised in fee of certain lands in the parishes of *Jevington* and *Folkington* in *Suffex*, by will dated 12th *January* 1693 devised the same "to her son *Richard Lemmon* and her daughter *Elizabeth* wife of *E. Baldy* and their heirs for ever, provided that if her said son and daughter should both have issue, then both their dividends aforeaid were to go to the issue of their own bodies; but if but one of them should have issue, then the premises should go to that issue, whether it be the child of her son or daughter aforeaid: but if they both died without issue of their own bodies, then immediately to the right heir at law and his heirs for ever." On the devisor's death her son and daughter entered and became seised of the estate by virtue of the will. Afterwards by indentures of lease and release (executed after the death of *Edward* the husband of *Elizabeth Baldy*) dated the 21st and 22d of *November* 1748, *Richard Lemmon* granted all his undivided moiety to *Elizabeth Baldy* in fee, and thereby covenanted to levy a fine sur cognizance de droit come ceo &c unto the said *Elizabeth Baldy* and her heirs of the said moiety, which fine was thereby declared to enure to the use of the said *Elizabeth* in fee. *Elizabeth Baldy* had two sons who died in her lifetime without issue, and also one daughter *Elizabeth* who intermarried with *Thomas Allen* and died in the lifetime of *Elizabeth Baldy* leaving an only daughter *Elizabeth Allen*. *Elizabeth Baldy* by will dated 6th *October* 1744 devised to her grand-daughter *Elizabeth Allen* in fee "all that her part and parcel of freehold lands lying in *Jevington* and *Folkington*" &c. *Elizabeth Baldy* after purchasing a moiety of the estate from her brother *Richard Lemmon* did not make any alteration in her will, but died intestate as to that moiety without having barred the entail of her original moiety, and before any fine was levied by her said brother pursuant to the deeds of lease and release. And upon the death of *Elizabeth Baldy* on the 15th of *December* 1748 *Elizabeth Allen* her grand-daughter entered in-

The rule of *possessio fratris* does not apply to estates tail, nor to inheritances in fee-simple without an actual possession of the brother of the whole blood. Devise to "*A* and *B* and their heirs for ever provided that if both have issue then both their dividends to go to the issue of their own bodies; but if but one have issue then the premises to go to that issue" &c: held that *A* and *B* took estates tail. *A* afterwards conveyed his moiety to *B* in fee by lease and release with a covenant to levy a fine; that created a base fee in *B*, which estate was afterwards confirmed by the fine, tho' that was not levied till after the death of the releasee.

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to possession of the whole estate. A fine was afterwards levied in *Trinity* term 1749 of the moiety, wherein *Elizabeth Allen* was plaintiff and the said *Richard Lemmon* the elder deforciant, but no deed to lead the uses of such fine was then or at any time afterwards executed. On the 27th of *July* 1749 *Elizabeth Allen* intermarried with *Benjamin Brooker*, and died in *April* 1790 without issue and intestate. *Richard Lemmon* the elder had issue by his first wife one son named *Richard Lemmon*, and a daughter, *Martha*, and by his second wife had issue three daughters, *Ann*, *Elizabeth*, and *Grace*; all of whom survived their father. *Richard Lemmon* the son afterwards died without issue and intestate, leaving his sister *Martha* of the whole blood and his three sisters of the half blood and the said *Elizabeth Brooker* him surviving. His sister *Martha* intermarried with *John Whichelo*, and afterwards died leaving *John Whichelo*, the present defendant, her eldest son and heir at law, who on the death of *Elizabeth Brooker* entered into possession of the premises which he now retains. *Ann* the eldest daughter of *Richard Lemmon* the elder by his second marriage is dead, leaving *James Gregory* one of the lessors of the plaintiff her grandson and heir at law. *Elizabeth*, the second daughter of *Richard Lemmon* the elder by the second ventre, died in *June* 1789 without issue; and *Grace* the third daughter is also dead leaving *Diones Geere* the other lessor of the plaintiff her only son and heir at law.

The question reserved for the opinion of the Court was whether the plaintiff is entitled to recover the said two third parts or either of them; if so, the verdict to stand; if one only, the verdict to be entered accordingly: if neither, a verdict to be entered for the defendant.

Conste for the lessors of the plaintiff. By the will of *Elizabeth Lemmon*, from whom all the parties claim, *Richard Lemmon* her son and *Elizabeth Baldy* her daughter took estates tail in moieties, as tenants in common, with cross remainders to their issue. Afterwards by the sale of *Richard Lemmon's* part to *Elizabeth Baldy* the whole vested in her and descended to *Elizabeth Brooker* then *Elizabeth Allen*. And upon her death without issue in 1790 the question is who are the issue inheriting under the entail created by *Elizabeth Lemmon's* will? Now the lessors of the plaintiff, one of whom is the grandson and the other the great-grandson of *R. Lemmon* the elder through his daughters by his second marriage, are entitled each to one third, and the defendant who claims through the

eldest daughter of *Richard Lemmon* the elder to the remaining third. It is unnecessary to consider the operation of the fine in this case, whether or not it converted a moiety of the estate-tail into a fee, for in either way of considering the question the lessors will be entitled to the same proportion. For it is stated in the case that *Richard Lemmon* the son (through whose sister *Martha*, of the whole blood, the defendant claims the whole) died in the lifetime of Mrs. *Brooker*, and consequently was never in possession of the estate. But all the three sisters of *Richard Lemmon* the younger are equally of the whole blood of *Richard Lemmon* the father, from whom alone they must all claim, they being his heirs special per formam doni. It is clearly settled that the rule of possessio fratris does not apply to entails, *Co. Lit.* 15. b. For the heirs in the entail are not to make title as heirs of the whole blood of the person last seised, as in the case of lands held in fee-simple, but as heirs to the original donee. *Plowd.* 57. *Ratcliffe's case*, 3 *Co.* 42. *Goodtitle v. Newman*, 3 *Wils.* 526. So on the other hand *Martha* the sister of the whole blood of *Richard* the younger cannot claim lands in fee from him who was never seised, but can only claim from her father or grandmother, in which case the claims of *Ann* and *Grace* her half sisters stand upon an equal footing with her own. In either case therefore the lessors are entitled to recover two thirds.

Holroyd contra admitted that he could not claim more than one third for the defendant.

LORD KENYON C. J. In the case of estates tail the half blood coming within the description of the entail may inherit as effectually as the whole blood. There the rule of possessio fratris does not apply. Neither does it in the case of peerages. Nor does that rule hold even with respect to inheritances in fee-simple unless there be an actual possession of the brother, or that which has been deemed equivalent. For in that respect there is a difference between freehold and chattel leases outstanding. In the former case unless the elder brother afterwards obtain possession by the receipt of rent or other acknowledgment, the descent will be to the younger brother of the half blood in preference to the sister of the whole blood: but in the case of a chattel lease outstanding, the possession of the tenant is the possession of the landlord; and there the rule of possessio fratris attaches (a). In this case it clearly appears that the children of *Elizabeth Lemmon* took estates tail under her will.

(a) *Vi. Doe v. Keen*, 7 vol. 390. *Co. Lit.* 15 a. and *Jenk.* 242.

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But it also appears to me, if it were necessary to enter into that question, that the conveyance by *Richard Lemmon* one of the tenants in tail of his moiety to his sister having created a base fee (a), that estate so created was afterwards confirmed (b) by the fine, which though not levied until after the death of the releasee was governed by the previous deed to lead the uses of it.

Per Curiam. Verdict to be entered for the plaintiff for two thirds.

(a) Vid. *Marshall v. Clarke*, 2 *Ld. Ray.* 779. | *Doe d. Neville v. Rivers*, ante, 7 vol. 276.
Doe d. Tyrrel v. Shilson, 3 *Burr.* 1703. and | (b) Vi. *Stapilton v. Stapilton*, 1 *Atk.* 8.

Friday,
April 19th.

The lessor of a house at rack rent (there being no other person entitled to any kind of rent) is liable to contribute to the expences of a party-wall under stat. 14 *Geo. 3. c.* 78, though the lessee has improved the house demised.

BEARDMORE against Fox.

REPLEVIN for taking the goods and chattels of the plaintiff in a dwelling-house in *Piccadilly*. The defendant, as bailiff of *M. Blount*, acknowledged the taking &c. as a distress for 100 *l.* due for one year's rent of the house on the 25th of *December* 1797. The plaintiff pleaded in bar, 1st, as to 60 *l.* 8 *s.* 8 *d.* parcel of the 100 *l.* riens in arrear; whereupon issue was joined. And as to 39 *l.* 11 *s.* 4 *d.*, residue of 100 *l.*, he pleaded a tender and refusal before the distress, whereupon also issue was joined. Secondly as to the sum of 60 *l.* 8 *s.* 8 *d.* parcel of the 100 *l.* the plaintiff further pleaded that before the distress the party-wall between the dwelling-house and the house adjoining had been pulled down by virtue of the statute 14 *G. 3. c.* 78., and that in pursuance of the statute he had paid the 60 *l.* 8 *s.* 8 *d.* for one moiety of the expence of rebuilding the party-wall; and that by virtue of the statute he deducted the sum of 60 *l.* 8 *s.* 8 *d.* out of the rent otherwise payable to *Blount*; *Blount* being the owner and person entitled to the improved rent of the dwelling-house in which &c.

The defendant replied that *Blount* was not the owner and person entitled to the improved rent thereof; on which also issue was joined. On the trial before Lord *Kenyon* at *Westminster* at the sittings after *Michaelmas* term the tender was admitted; and the jury by his Lordship's direction found a verdict for the defendant on the other two issues for 60 *l.* 8 *s.* 8 *d.*, subject to the opinion of this Court on the following case.

The

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The premises, for which the rent is claimed, consist of a dwelling-house &c; and for some few years before and down to the 22d of *March* 1787 the plaintiff and his partner *W. Galley* since deceased occupied the premises and carried on the business of stock-brokers and lottery-office keepers there at the annual rent of 90*l.* Mr. *Blount*, being seised in fee of the premises, by indenture dated 22d *March* 1787 leased them to the plaintiff and *Galley* for a term of sixty years from the 25th of *December* then last at the annual rent of 100*l.* The lease contains a covenant for payment of the rent of 100*l.* "without any deduction or abatement for or by means of any taxes rates assessments contributions impositions payments or charges whatsoever that now are or shall or may be charged or imposed upon the premises or on *M. Blount* in respect of the same by authority of parliament or otherwise howsoever, the land-tax only excepted;" and also a general covenant (a) to repair the premises. At the time of granting this lease the premises were greatly out of repair, and soon afterwards the lessees, *Beardmore* and *Galley*, made considerable repairs and alterations therein and expended about the sum of 700*l.* In the end of the year 1795 and beginning of 1796 the wall between the house and the adjoining house was pulled down by the owner of the adjoining house, who built a new party-wall. The expence which the 41st section of the stat. 14 *Geo. 3. c. 78.* directs shall be borne by the owner of the improved rent of the adjoining building or ground, and to be paid by the tenant in possession to the person at whose expence a new party-wall shall be built, amounted to 60*l.* 8*s.* 8*d.*, which sum was paid by the plaintiff to the person by whom the party-wall was built before the time of the distress, and notice thereof was given to the defendant and Mr. *Blount*. By agreement between the plaintiff and his co-lessee *Galley*, dated 6th of *February* 1796, reciting that they intended to dissolve their partnership, the plaintiff undertook to convey his share and interest in the dwelling-house and premises to *Galley* from the 21st of *April* then next for the sum of 1000*l.* On the 6th of *March* 1796 *Galley* died. In *May* 1796 *Galley*'s executors caused the entire interest in the lease and premises to be put up to sale by auction, and the same was bought by the plaintiff for 577*l.* 10*s.*, and the plaintiff still continues to carry on the business in them. In *August* 1797 *Galley*'s executors conveyed back to the plaintiff the interest which *Galley* took in the

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FOX.(a) This covenant does not vary the question. See *Sangster v. Birkhead*, *Bos. & Pul.* 303.

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premises under the agreement of the 6th of *February* 1796, and paid him the sum of 422*l.* 10*s.* being the difference between the sum of 1000*l.* mentioned in the agreement and the sum of 577*l.* 10*s.* In consequence of the pulling down and rebuilding of the party-wall some expence was necessarily incurred by the plaintiff, and he took that opportunity to make further repairs and alterations, and upon the whole he expended upon the premises at that time about 800*l.* in addition to the sum which he and *Galley* had before laid out thereon. The premises would now let for a shop at the annual rent of from 180*l.* to 200*l.*, and the ground whereon they stand, independently of the buildings, would let for buildings at the rent of 100*l.* a-year. The question for the opinion of the Court is whether upon the true construction of the stat. 14 *Geo.* 3. c. 78. *f.* 41. *Blount* is the owner and person entitled to the improved rent of the premises, and consequently liable to bear the expence of the party-wall; if the Court shall be of opinion that he is, then a verdict is to be entered generally for the plaintiff; if the Court shall be of opinion that he is not, the present verdict is to stand.

Abbott, for the plaintiff, relied on the latter words in the statute 14 *Geo.* 3. c. 78. *f.* 41., "Whereupon it shall be lawful for the tenant or occupier of such adjoining building or ground to pay one moiety &c to such first builder &c and to deduct the same out of the rent which shall become due from him to such owner under whom he holds the same &c", to shew that in such a case as the present the expence of the party-wall must be borne by the landlord. Otherwise (he observed) the words at the beginning of that section "owner of the improved rent" must be construed "owner of the improved value; which construction is not only contrary to the obvious meaning of the Legislature and the words used but will also be productive of an infinity of actions. And he referred to the case of *Southall v. Leadbetter* (a), where it was holden that the Legislature intended, by this statute, to throw the expence on the landlord when the lessee takes a house at rack-rent.

Gaselee, contra, contended that the words "improved rent" ought to be construed the same as "improved value;" otherwise if *A.* demised land on a building lease at the annual rent of 20*s.*, and the lessee built and did not then let the house, the expence of

(a) *Ante*, 3 vol. 458.

the party-wall would fall on the landlord who only received the small rent of 20*s. per annum*. Now here the plaintiff is the owner of the improved value; for it appears by the case that the land alone is worth 100*l. per annum* and the house another 100*l.*, and that he only pays 100*l.* a-year for the whole. He said that this was distinguishable from the case cited, because there the lease was only granted for twenty-one years, whereas this was a long lease for sixty years of which only a few are expired; and therefore the lessee has the principal benefit of the party-wall, the interest of the reversioner being very remote. At all events the landlord, Mr. *Blount*, cannot be considered as the owner of the *improved* rent, since there is no improved rent at all in this case, there being only one rent. If this be a case for which the Legislature have made no provision in the statute, the defendant has a right to avail himself of that omission; since the plaintiff can only make his demand on the landlord on the authority of the act; and the words at the latter end of section 41., giving the authority, are "*such owner*", *i. e.*, "the owner of the improved rent before-mentioned."

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BEARDMORE
against
FOX.

But *The Court* were of opinion that under this act the expence of the party-wall must be borne by Mr. *Blount*, the landlord; that if they were to put a different construction on the statute, every lessee at rack-rent, who happened to improve the house demised to him, would be liable to such expence in consequence of his improvements, which was highly unreasonable. And that, if it were proper to make any alteration in the law in this respect, it could only be effected by the Legislature.

Postea to the plaintiff.

The KING against DUNN.

Friday,
April 19th.

MR. *Girdlestone* a magistrate of the county of *Norfolk* had convicted the defendant for using engines to kill game under the 5 *Ann. c. 14.*; the 2d section of which provides that the proceedings shall not be removed by certiorari unless the party convicted shall before the allowance of such certiorari become bound to the prosecutor in 50*l.* with such sufficient sureties as the convicting

The 5 *Geo. 2. c. 19. s. 2.* requiring the party removing a conviction by a magistrate into *B. R.* to enter into a recognizance with

two sureties in 50*l.* conditioned to prosecute the writ with effect &c is not complied with by the party and his two sureties entering into a recognizance in 25*l.* each, but it must be in the entire sum of 50*l.*

magistrate

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The KING
against
DUNN.

magistrate shall think fit, with condition to pay to the prosecutor within fourteen days after such conviction or procedendo granted his full costs &c (a). The defendant intending to remove the conviction into this court by certiorari, in order to make an application for an information against Mr. *Girdlestone* for mal-practice in his office, obtained the writ last term returnable immediately; and entered into a *recognizance* with two sureties, each in 25*l.*, before another magistrate, and delivered such recognizance with the certiorari to Mr. *Girdlestone* (b).

Mingay moved on a former day, upon production to the Court of the certiorari and recognizance, but without any return made to the certiorari, that the writ be quashed quia improvide emanavit; inasmuch as there could be no regular allowance of it by the magistrate below unless the party convicted entered into a recognizance in 50*l.* as required by the 5 *Geo. 2. c. 19. s. 2*, and as the statute was not complied with by a recognizance of three persons in 25*l.* each. And

The Court (after hearing *Erskine* on the other side) were clearly of opinion that there ought to have been a single recognizance of

(a) The Court did not decide whether or not the party convicted should give a bond pursuant to this statute before the removal of the conviction by certiorari into this court, no objection having been taken by Mr. *Girdlestone's* counsel on that ground; and in fact such a bond was given before the motion was finally disposed of. See the next note.

(b) This method was taken with a view to comply with the requisites of the 5 *Geo. 2. c. 19. s. 2.*; throughout the whole argument it was assumed that this statute applied to the present case; and the attention of the Court was never called to that point. But it may admit of doubt how far that assumption was warranted; for the title of the act of 5 *Geo. 2.* is "to oblige justices of the peace at their general or quarter sessions to determine appeals made to them according to the merits of the case notwithstanding defects of form &c, and to oblige persons suing forth writs of certiorari to remove orders made on such appeals into B. R. to give security to prosecute the same with effect." The 1st sect. reciting that "in many cases where justices of the peace are empowered to make judgments or orders great expences have been occasioned by reason that such judgments or orders have on appeals to the quarter sessions been quashed on objections

to form &c" enacts "that upon all appeals to be made to the quarter sessions against judgments or orders made by any justices as aforesaid, such justices shall upon such appeals cause any defect of form in any such original judgments or orders to be amended without costs &c, and proceed to examine into the merits &c." Then the 2d section (on which this question turned) reciting that "writs of certiorari have been procured to remove such judgments or orders into B. R. in order to discourage and weary out the parties by delays and expences" enacts "that no certiorari shall be allowed to remove any such judgment or order, unless the party prosecuting such certiorari, before the allowance thereof, shall enter into a recognizance with sufficient sureties before a justice of the peace of the county or place or before the justices at their quarter sessions where such judgment or order shall have been given, or before one of the Judges of B. R. in the sum of 50*l.*, with condition to prosecute the same at his own costs with effect &c." Now the statute of *Ann* on which the conviction was founded gives no appeal to the quarter sessions; but only requires the party removing the proceedings by certiorari into this court to "become bound to the person prosecuting the same in the sum of 50*l.* with two sufficient sureties &c."

the defendant and two sureties in 50 *l.*, and that the recognizance taken in 25 *l.* each was not a sufficient compliance with the act of parliament.

Erskine then contended that the effect of this would not be to make the rule absolute for quashing the certiorari, because the writ itself had been properly sued out, as it must be, before the entering into the recognizance; but that the party convicted was still at liberty to tender a sufficient recognizance to the magistrate, who would be thereupon bound to allow the certiorari, and then the Court would have the conviction regularly returned before them.

Mingay resisted this; contending that the writ before sued out was *functus officio*, and no further proceeding could be had upon it; and that no other writ could now be sued out as the time was expired, which is six months after the conviction by 13 *Geo.* 2. c. 18. *f.* 5.

Per Curiam. The writ of certiorari itself was properly issued, but we cannot proceed upon it till it has been regularly returned to us: and the party suing out the writ has no right to call upon the magistrate to allow and return it, until he has entered into a proper recognizance such as the statute requires. Here it appears that no such recognizance has been entered into, and therefore we cannot compel the magistrate to make a return to the writ. We cannot however quash the writ or take any further notice of it till it has been properly allowed and returned.

Rule discharged.

On a subsequent day in this term (a recognizance pursuant to the statute of the 5 *Geo.* 2. c. 19. *f.* 2. having been in the mean time entered into and returned with the conviction into this court) *Erskine* obtained a rule calling on Mr. *Girdlestone* to shew cause why an information should not be granted against him under the circumstances disclosed.

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against
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The KING
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Mingay resisted this; contending that the writ before sued out was *functus officio*, and no further proceeding could be had upon it; and that no other writ could now be sued out as the time was expired, which is six months after the conviction by 13 *Geo. 2. c. 18. s. 5.*

Per Curiam. The writ of certiorari itself was properly issued, but we cannot proceed upon it till it has been regularly returned to us: and the party suing out the writ has no right to call upon the magistrate to allow and return it, until he has entered into a proper recognizance such as the statute requires. Here it appears that no such recognizance has been entered into, and therefore we cannot compel the magistrate to make a return to the writ. We cannot however quash the writ or take any further notice of it till it has been properly allowed and returned.

Rule discharged.

On a subsequent day in this term (a recognizance pursuant to the statute of the 5 *Geo. 2. c. 19. s. 2.* having been in the mean time entered into and returned with the conviction into this court) *Erskine* obtained a rule calling on Mr. *Girdlestone* to shew cause why an information should not be granted against him under the circumstances disclosed.

1799.

Saturday,
April 20th.The KING *against* CLARKE.

On a question of qualification of a defendant for killing game the convicting magistrates may ground their opinion of his not being qualified on the fact of the defendant's having on a former day sworn under the income act to an estate under 100 l. a-year. The convicting magistrates ought to state in the conviction the whole of the evidence for and against the defendant.

THIS was a conviction on the 5 *Ann c. 14. s. 4.* for keeping and using a greyhound for the destruction of game without being duly qualified. The record of conviction returned into this court by certiorari, set forth the information, (which negatived the qualifications contained in the stat. of the 22 and 23 *Car. 2. c. 25.*) the summons to appear, the defendant's appearance, and plea of not guilty, the examination upon oath of the informer on the 29th *September 1798*, in the presence and hearing of the defendant, wherein the informer deposed that on the 14th *September 1798* at &c. the defendant "did keep and use a greyhound to kill and destroy the game, and *that he* (the informer) *then and there saw the said defendant course and kill a hare with the said greyhound &c.*" and further "that the defendant had not then any lands or tenements or any other estate of inheritance &c of the clear yearly value of one hundred pounds &c" negating specifically each of the qualifications enumerated in the stat. of *Car. 2.* The conviction then proceeded as follows; "and it duly appears to us the said justices in the presence of the said defendant that he on the 22d *March 1798* at &c. before *B. F. and B. C. (a)* &c. commissioners appointed by "an act for granting to his Majesty an aid and contribution for the prosecution of the war," then and there acting as such commissioners did make a declaration in writing signed by him that his *annual income* did not exceed 50 l. and that the said defendant was then and there examined by the said commissioners, and then and there upon his oath deposed that the value of the whole lands tenements and estate of the said defendant was then 70 l. a-year and no more; and it further duly appears to us the said justices in the presence of the defendant on &c. that the said commissioners on the said 22d *March 1798* agreeably to the directions of the act &c. did rate the defendant, being then both owner and occupier of the whole of his lands &c. at one and a half year's rent of his said lands &c. amounting to 105 l. and that the defendant then and there stated upon oath before the said commissioners that 17 l. a-year interest money was then payable out of his said lands &c. and did then and there claim to be allowed the same as interest paid for money charged upon his said lands &c. and that the same was then and there allowed to

(a) The Justices before whom the defendant was convicted.

the said defendant &c. and was deducted from the said 105 *l.*, and that after such deduction he then was and still is assessed at 88 *l.* and no more. And the defendant on &c. before us the said justices admits that he made the said declarations and claim of allowance &c. and received such allowance, and that the value of his said lands &c. has not increased since the time of making such declarations &c. and that he has not since the said 22d of *March* 1798 acquired other lands &c. and that the said 17 *l.* a-year interest money is still payable out of his said lands &c." The conviction then proceeded to state that the defendant, being called upon to make his defence, said that he was possessed of an estate in the parish of *Whitgift* of the yearly value of 100 *l.* and upwards, and produced *A. B.* a witness, who said that "he knew the defendant's said estate and he thought the same worth 100 *l.* a-year, and that he the witness would give 100 *l.* a-year and upwards for it; but admitted that he would not swear that the defendant's said estate was worth 100 *l.* a-year clear of reprises;" and the defendant being here questioned by us the said justices whether he will produce any witness to prove that his said lands tenements and estate are of the yearly value of 100 *l.* clear of all reprises did not produce any such witness &c. and did not require any further time &c. Wherefore &c.

Chambre objected to the conviction, because it did not appear that the facts on which the magistrates adjudged that the defendant was not duly qualified were properly in evidence before them; they having relied upon a prior transaction which happened before themselves when acting as commissioners for another purpose, but which ought to have been established on oath at the time of the conviction before the magistrates in the presence of the defendant, in order that he might have had an opportunity of controverting or explaining it. On the other hand it appears that the witness produced by the defendant at the time of the conviction swore to the defendant's being possessed of an estate of 100 *l.* a-year and upwards, and that he would give that rent for it; and (he observed that) it could not be expected that he should swear to it's being worth that sum above reprises, nor was it necessary. Besides, even admitting that there was proper evidence before the magistrates of a deduction of 17 *l.* a-year out of the 105 *l.* the value assessed by themselves on the former occasion, it does not appear but that this was on account of simple contract debts (a).

(a) In *Wetherill v. Hall*, B. R. M. 23 Geo. 3. it was holden that an estate, the rents of which were reduced under 100 *l.* a-year | by paying the interest of a mortgage, gave no qualification for killing game.

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Law, Heywood, and Danfer, contra were stopped by the Court.

Per Curiam (a). It must be taken pro confesso that the defendant at the time mentioned in the conviction when he was before the commissioners on the amount of his income had not then an estate of 100 *l.* a-year in value. It is evidence out of his own mouth. And the witness adduced by him did not contradict this, even if he were credited to the full extent of what he deposed; for he would not undertake to say that the estate was of that value clear of reprises. And as to the deductions being on account of simple contract debts, the contrary appears by the defendant's own shewing; for he claimed the allowance before the commissioners for the interest of money *charged upon his estate*.

The Court at the same time testified their approbation of the manner in which the conviction was drawn up; in which the magistrates had not simply stated, in the terms of the act of parliament, that the defendant had kept and used the greyhound for the purpose of killing the game, but had set forth the particular evidence of his having so done, namely, that the witness had "seen him course and kill a hare with the said greyhound"; and had also set forth all the evidence for and against the defendant upon the question of his qualification. And they recommended this as a precedent to be followed in future; expressing themselves much dissatisfied with the general mode of stating the evidence which had been practised in these cases (*b*).

Conviction affirmed.

(*a*) Absent *Lawrence J.*, who was sitting in the Court of Chancery this day.

(*b*) Vid. *R. v. Hartley, Cald.* 175. and *Rex v. Thompson, ante*, 2 vol. 18. where convictions stating the evidence generally were holden good. But in *Lowet's case, ante*, 7 vol. 152., though the strict legality of that mode of stating the evidence was ad-

mitted because there had been so many decisions, the Court reprobated the practice very strongly, and granted a rule nisi for an information against the convicting magistrate for not having stated all the evidence given on behalf of the defendant: but the rule was afterwards discharged, it appearing that he had acted by mistake.

Tuesday,
April 23d.

LEPINE and others Executors *against* BARRATT.

If the principal be surrendered in time, but the bail omit to give regular notice of it to the plaintiff, in consequence of which he proceeds upon the bail-bond, the bail may apply to set aside the proceedings on payment of costs even after execution levied and the money is in the sheriff's hands.

GURNER shewed cause against a rule for setting aside proceedings on the bail-bond on payment of costs, on the ground that the bail had surrendered their principal in time. First, he objected,

that

that there was no notice in writing of the render, which was required by the practice of the Court, and without which the plaintiff was not bound to take notice of it. 2dly, That there was no instance where the Court had granted such a rule even on payment of costs after execution levied on the judgment obtained against the bail; and that here the debt was levied and in the hands of the sheriff; and that in *Manning v. Turner* (a) the motion was made before execution issued. 3dly, That the Court would not grant such a rule in a case where the plaintiff cannot be put in as good a situation as before the laches of the bail, which could not be done here, inasmuch as the defendant had since made away with his property and was in prison.

Garrow and *Esplanasse*, in support of the rule, said it was never too late before the money got into the plaintiff's hands to make this application upon payment of costs. It was true that regular notice had not been given of the surrender of the principal, and therefore in strictness the proceedings against the bail were regular. But they stated circumstances from whence it was to be inferred that the plaintiff's attorney had notice of the render in time, which was an answer to any supposed hardship in the particular case. (This however was afterwards denied by the defendant's attorney in an affidavit.)

Per Curiam. According to the established practice of the Court, if the principal be rendered in time, but no regular notice has been given of it to the plaintiff, who thereupon proceeds against the bail, the latter are entitled of course to be relieved upon payment of all the costs incurred by their own laches. There is no distinction in this respect whether the application be made before or after execution issued; but the longer the delay, the more costs they will have to pay. There is no reason why the rule should not apply to this particular case.

Rule absolute.

(a) 8 *Mod* 280. which was cited on obtaining the rule nisi.

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against
BARRATT.

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Tuesday,
April 23d.

The Honourable S. H. LUMLEY, Administrator de bonis non of the Honourable Captain T. LUMLEY, against E. SUTTON.

The captain of a ship actually on board at the time of a capture is entitled to prize-money, though under arrest at the time, and though another officer had been sent on board to command the ship.

THIS was an action of assumpsit brought by the direction of the Court of Chancery to try, 1st, Whether or not the plaintiff were entitled to a captain's share of certain prize-money amounting to 1416*l.* 13*s.* 4*d.* in respect of his Majesty's ship, *Isis*, one of the squadron commanded by the late Commodore *Johnstone*; 2dly, Whether or not the defendant were entitled to such share of the prize-money. On the trial at the *Westminster* Sittings after last *Trinity* term a verdict was found for the plaintiff, subject to the opinion of this Court on a special case.

In *August* 1780 the defendant was appointed by the Lords of the Admiralty captain of the *Isis*, and in *March* 1781 he sailed with several other ships under the command of Commodore *Johnstone* on an expedition against the *Cape of Good Hope*. On the 16th of *April* 1781 the fleet, having been attacked by a *French* fleet in *Port Praya Bay*, put out to sea in pursuit of the enemy and returned to *Port Praya* on the 20th of *April*. On the next day Commodore *Johnstone* put the defendant under arrest to be tried by a Court Martial on a charge of misconduct on the 16th for disobedience of orders and signals, and appointed Captain *Lumley*, then master and commander of the *Oporto*, to command the *Isis* until a Court Martial could be holden on the defendant; and on the same day he appointed Mr. *Linxee* to command the *Oporto*. On the 2d of *May* 1781 the commodore sailed from *Port Praya*, the defendant remaining on board the *Isis* in a state of arrest, and on the 21st of *July* 1781 his fleet captured some *Dutch* ships in *Saldanka Bay*, Captain *Lumley* then and until the 2d of *June* 1782 acting as captain and commander of the *Isis*. The case then stated the sailing of the *Isis* to the *East Indies*, with Captain *Sutton* on board, where in *June* 1782 he was superseded by Sir *E. Hughes*, his return to *England*, trial, and acquittal, his action for damages against Commodore *Johnstone*, and the result of those proceedings. [See *ante*, 1 vol. 493, et seq.; and 1 *Bro. P. C.* 76. 8vo edit.] It then stated (inter alia) his Majesty's warrant, dated *May* 20th 1796, to the Registrar of the court of appeals for prize causes, directing

directing that the proceeds of the prizes taken at *Saldanha Bay* should be divided "between the army and navy employed in the said expedition &c;" and that in pursuance of his Majesty's proclamation, dated the 27th of *December* 1780, the commanders of ships should transmit to the Commissioners of the Navy a list of the names of all the officers seamen &c and others who were actually on board at the time of the capture, and that such list should contain the quality of the service of each person on board &c. The case then stated that Captain *Lumley* transmitted a book or prize-list to the Commissioners of the Navy, signed by himself as "acting captain", containing the names and quality of all the crew on board the *Isis* at the time of the capture, in which list Captain *Lumley's* name was not inserted, but in which that of Captain *Sutton* was inserted as captain: but in another "list of supernumeraries borne for wages and victuals" the name of Captain *Lumley* was inserted as "acting captain". That in the pay-book of the *Isis*, signed by Captain *Newnham* who succeeded Captain *Lumley*, Captain *Sutton* is entered as captain of the *Isis* from the 28th of *August* 1780 until the 2d of *June* 1782, during which time Captain *Lumley* was in the list of supernumeraries for wages and victuals, and from which time until the 3d of *September* 1782 Captain *Lumley* was entered as the captain. That the same entries were made in the muster-book of the *Isis*, delivered to the Commissioners of the Navy, and also in the purser's muster-book. That the defendant received his pay as captain of the *Isis* from the date of his commission until the day of his acquittal, the 11th of *December* 1783, and had the usual allowances for servants during that period as captain of the ship. That neither Captain *Lumley* or his representative has ever received any pay for his services on board the *Isis*: but if his muster-books stop-books and other accounts during the time he acted as captain on board that ship were delivered and regularly passed, an order for payment must by the usage of the navy be obtained from the Lords of the Admiralty, and his representative would be paid from the 21st of *April* 1781 to the 2d of *June* 1782 as any other captain of a King's ship of the same rate; from the 2d of *June* 1782 he would be paid for his services in the ordinary way without any order from the Admiralty, if his muster-books stop-books and other accounts were delivered and regularly passed. The case also stated that in 1785 the late Lady *Scarborough*, the administratrix of Captain *Lumley*, brought an action
for

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for Captain *Lumley*'s share of prize-money against the prize-agents, who filed their bill of interpleader in Chancery and for an injunction; and in consequence of the proceedings of that Court the present action was directed to be brought.

Hartley, for the plaintiff, after stating that the question depended on the King's proclamation (a) dated the 2d of *January* 1781, and the King's warrant, founded on the act of parliament (b), contended 1st, That the defendant was not entitled to the share of the prize-money in question, and 2dly, That the plaintiff was. First; The defendant was not the commanding officer or captain of the *Isis* at the time of the capture within the meaning of the words of the proclamation "captain or commander actually on board". A captain or other officer is not from the mere circumstance of his being corporally on board at the time of the capture entitled to prize-money; he must be acting in the capacity of captain in the particular station. In *Wemys v. Linzee* (c) it was holden that the plaintiff, a captain of marines who was on board the *Surprise* frigate at the time of a capture, was not entitled to share prize-money as captain, because he did not belong to the ship's complement, and that he could only share as a passenger on board. So here the defendant was not commanding officer of the *Isis* within the meaning of the proclamation, because at that time he was suspended; during his suspension he was not responsible for the management of the ship, but the whole responsibility was then thrown on another person, Captain *Lumley*. The principle on which the case of *Johnstone v. Margetson* (d) was decided is also applicable to this case: there it was holden that a flag-officer, who after giving orders to one of the ships under his command to sail on a cruise received an appointment to another command, was not entitled to share in the prize taken by the ship so sent out by him to cruise, though no other flag-officer was appointed to

(a) The King's proclamation, which issued on the breaking out of the war with the *Dutch*, said that all prizes taken should be distributed among the captors "for the entire benefit and encouragement of our flag-officers captains commanders and other commissioned officers in our pay, and of the seamen marines and soldiers on board our said ships and vessels at the time of the capture"; and it directed the commanders of ships taking prizes to transmit to the Commissioners of the Navy a true list of the

names of "all the officers seamen marines soldiers and others who were actually on board our ships and vessels of war under their command at the time of the capture; which list shall contain the quality of the service of each person on board and be subscribed by the captain or commanding officer."

(b) 21 Geo. 3. c. 5.

(c) *Dougl.* 324.

(d) 1 H. Bl. Rep. 261.

succeed

succeed him; and it was so decided on this ground that the ship was not actually under his command at the time of the capture. If it be contended that the defendant is entitled to the money in question because he was entered as captain of the *Isis*, it may be admitted that he was entitled to his pay. If the title to pay also conferred a title to prize-money, the same argument would equally apply in favour of Captain *Lumley* who was also entitled to his pay. But pay is given as a remuneration for services: whereas the title to prize-money depends on the words of the King's proclamation founded on the act of parliament. Secondly; The plaintiff is entitled as representing Captain *Lumley*, who was captain of the *Isis*, and acting on board as such at the time of the capture. He was appointed to the command of that ship by a person having competent authority, and is therefore entitled to the profits belonging to that situation. And the circumstance of his having no commission from the Admiralty to command the *Isis* is immaterial, because the distribution of prize-money under the King's proclamation is intended as a reward to those by whom the duty is actually performed. Captain *Lumley*, having been ordered by the commander on that station to leave the *Oporto*, cannot claim any prize-money as captain of that ship because he was not actually on board her at the time; and therefore it would be peculiarly hard on him to decide that he cannot have the captain's share of the prize-money belonging to the *Isis*; since in that case he would lose the prize-money altogether.—It was also said that the usage of the Navy was in favour of the plaintiff's claim.

Wood contra. The defendant answers every part of the description of the person entitled to the prize-money as captain of the *Isis* within the meaning of the King's proclamation. He was an officer in his Majesty's pay at the time of the capture; he was rated in the books; was entitled to pay as captain; was actually on board at the time of the capture; and in the list transmitted to the Navy Board according to the directions of the proclamation Captain *Lumley* himself inserted the defendant's name as captain. He was then captain of the *Isis* under a commission from the Admiralty, which was not revoked until after the capture. And though he was at that time suspended by the commodore's orders, the effect of that suspension could not be to deprive him of any of the advantages belonging to the situation of captain in the event of his being afterwards acquitted by a Court-martial (a).

(a) Vid. *Sutton v. Johnstone*, ante, 1 vol. 508, 509; and *Johnstone v. Sutton*, in error, ib. 526.

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against
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No arrest civil or military, nothing short of a removal from office, can have the effect of depriving a person of the profits of an office with which he was legally invested. It is admitted that the defendant is entitled to his pay as captain; and there seems no reason why he should not also be entitled to prize-money. If the case of *Wemyss v. Linzee* be at all applicable to this case, it is in favour of the defendant; because it shews that a person in the situation of Captain *Lumley*, who was entered on the supernumerary list, can only be considered as a passenger on board and entitled to share prize-money in the fifth class mentioned in the proclamation "of other persons on board assisting in the capture." The consequences of a decision in favour of the plaintiff may be prejudicial to the service; for then a flag-officer may put the commander of any ship under arrest and appoint a favourite of his own in his stead with a view of giving him the profits arising from captures.

Hartley in reply. There is little weight in the defendant's last argument, because a flag officer, though he has the power of arresting or superseding any of the officers under his command, cannot act arbitrarily or maliciously; if he do, the officer superseded may either bring him to a Court-martial or recover damages against him in a civil action. The question in this case must depend on the true construction of the proclamation and not on the acts of Captain *Lumley*; and therefore he cannot be prejudiced by the returns he made to the Navy Board: he was bound to transmit the list which he sent, but that cannot preclude him from any advantages to which by law he is entitled under the proclamation.

Lord KENYON Ch. J. If the question were which of the two officers was the most worthy to receive the prize-money in dispute, it would be difficult to decide, because they were both officers of great merit and distinction in their profession; for though a cloud hung over the head of the defendant for a certain time his character was re-established by the sentence of the Court-martial by which he was honourably acquitted. But the question before us depends on the act of parliament modelled by the King's proclamation; and whoever answers the description in the proclamation is entitled to the prize-money. In considering this question it is necessary to attend to the different dates stated in the case; On the 21st of *April* 1781 the defendant was put under arrest; on the 21st of *July* in the same year the capture was made which is the ground of the present contest; and the defendant was not superseded until the month of *June* in the following year. The title to prize-money
does

does not depend on the actual exertions of the captor. It cannot be contended that every temporary absence of the captain from the deck will deprive him of the profits of a capture; he may be disabled by wounds or any other sickness from making any exertions, and yet in such case he must share in the captures that are made. Here it appears that at one time the defendant was put under arrest, and that at a subsequent time he was superseded: but in the interval between those two periods who was the captain of the *Isis* actually on board? All the evidence disclosed in the case tends to shew that the defendant was. I admit that Captain Lumley ought not to be prejudiced by any list that he may have inadvertently made: but here it appears throughout that the defendant was returned as the captain of the ship, and that Captain Lumley's name was only mentioned on the supernumerary list. I agree, according to the case of *Wemyss v. Linzee*, that every officer who may be accidentally on board at the time of a capture is not entitled to share the prize-money as such officer; but the person who stands on the ship's books in the situation of captain of the ship and who is actually on board at the time of the capture is entitled to the captain's share of the prize-money; and here the defendant answers that description. It is admitted that the defendant is entitled to his pay as captain during his arrest; and I cannot say that he was captain on board for one purpose and not for another. Suppose it had been made a question whether or not Lord Pigot were entitled to his pay during the time he was under arrest; there is no doubt but that it would have been decided in his favour, for he continued governor though the hand of violence had laid hold of him. Here the defendant continued captain on board the ship, and is therefore entitled to the emoluments of his station though he had no opportunity of exercising his power. In deciding this question, we cannot consider the hardship of the case: but even if we could, the defendant does not appear in an unfavourable light; it turns out that the defendant was put under an arrest either by the mistake or by the violence of the temper of the commodore, for he was honourably acquitted by the Court-martial; and it having been decided (I take it for granted on proper grounds) by the Court of Exchequer-Chamber (a) that the defendant could not maintain any action against the commodore, it would be extremely hard on the defendant that he should also lose the profits of his office during the time he was under arrest. However I disclaim forming

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SUTTON.(a) *Johnstone v. Sutton*, in error, ante, 1 vol. 544.

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my opinion upon that ground, but on the ground that the defendant comes within the description in the King's proclamation of being the captain of the *Isis* actually on board.

GROSE J. The defendant comes within every part of the description of the person entitled to share prize-money as captain within the proclamation; he was rated as captain, registered, and returned as such in the monthly books, and he was actually on board when the capture was made; and during this time Captain *Lumley* only considered himself as a supernumerary. It would therefore be most unjust to deprive the defendant of the prize-money.

Lawrence J. All the facts stated in the case tend to shew that the defendant continued to be the captain of the *Isis* during the time of his arrest, and that Captain *Lumley* was not to have all the advantages to which the captain of a ship is entitled. The latter did not go on board as the captain of the ship, he was only rated for wages and victuals: but the regular captain of a ship has several other emoluments, one of which arises from the number of servants he is entitled to have. It is not necessary that the captain should be on deck giving orders, to be entitled to prize-money; for in case of sickness on board he would be entitled to prize-money, though the first lieutenant gave the orders during the engagement.

Postea to the defendant.

Tuesday,
April 23d.

GARRELS and Another against KENSINGTON.

A warranty of Danish property (Denmark being then a neutral power) in a policy of insurance on ship and goods was holden to be conclusively disproved by a sentence of a Court of Admiralty condemning the ship and cargo because the master and crew had broken their

neutrality in the course of the voyage insured by forcibly rescuing the ship which had been seized and carried into port by a belligerent power for the purpose of search. Any forfeiture of neutrality by the wilful act of the assured, or of the master &c., after the commencement of the voyage insured, is a breach of such a warranty.

THE plaintiffs declared upon a policy of insurance, which they as agents for *Frederick Westerman* and *Martin Viendt* caused to be effected for their principals on goods valued at 2900*l.* on board the ship *Dispatch* at and from *St. Thomas* to the *Havannah*, Danish ship and property; and they stated that in the prosecution of the voyage insured the ship with the goods on board was in a hostile manner attacked taken and carried away by persons unknown. At the trial before Lord *Kenyon* at *Guildhall* a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case. The defendant subscribed the policy for 200*l.* on the cargo, of the ship *Dispatch*, warranted Danish ship and property, on a voyage at and from *St. Thomas* to the *Havannah*. *F. Westerman* and *M. Viendt*, who were owners of the ship,

and interested in the property insured to the amount stated in the declaration, were *Danish* subjects residing at the *Danish* Island of *St. Thomas*, and the ship had on board a register, sea-letter, and general clearance from the Custom-House Judge and Commandant, and the captain's letter of instructions, being the ship's papers usually carried by *Danish* ships. The loss arose by capture as stated in the declaration; the circumstances attending which loss are disclosed in the following sentence of condemnation given against the ship in the *British* Vice-Admiralty Court at *St. Domingo*, upon a suit there instituted upon the relation of *Thomas White* Esq. commander of his Majesty's sloop of war the *Pelican*;

"And now on this present 9th of *November* 1797, Mr. Advocate-General having moved for the judgment of the Court, his Honor the Judge, after going through the whole of the evidence, and considering that it thereby appeared That the said neutral ship *Dispatch*, with the cargo on board, being *Danish* property, had been under the authority of the laws of nations and of war, and agreeably to existing treaties, stopped and detained by *John Gascoyne* Esq. commander of his Majesty's sloop *Pelican*, and by him sent towards the port of *Mole St. Nicholas* for the purpose of being legally examined under the command and direction of *Dennis Barrett* a midshipman of the said sloop *Pelican*, as prize-master, with two seamen; that on the near approach of the said ship to the harbour of *Mole St. Nicholas* aforesaid the said master supercargo and crew of the said ship *Dispatch* had in direct violation and breach of their neutrality as *Danish* subjects and contrary to the law of nations and the faith of treaties violently and forcibly at a preconcerted signal seized and taken possession of the said ship and her cargo from and out of the hands and possession of the said *Dennis Barrett* and his two seamen, and had retained possession thereof till again captured by a certain *French* privateer; and that the said ship *Dispatch* and her cargo were again captured and taken by his Majesty's said sloop of war *Pelican*, then under the command of *Thomas White* Esq. the relator in this cause; and after stating his reasons at large he was pleased to adjudge and decree that the said neutral ship or vessel called the *Dispatch*, her tackle &c and the goods &c on board her taken and seized by *Thomas White* Esq. commander of his Majesty's said sloop *Pelican* &c, were and are good and lawful prize; and to order adjudge and decree that the same be confiscate and condemned to our sovereign lord the King, to the use of the said *Thomas White* &c

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relators in this cause; and that the same be now sold and the monies distributed &c". As soon as the above sentence was known to the assured they abandoned to the underwriters. The question for the opinion of the Court is whether the plaintiffs are entitled to recover: if so, the verdict to stand; if not, then a verdict to be entered for the defendant.

Park for the plaintiffs. The question is, whether the warranty of the ship and cargo being *Danish* has been complied with; as to which the case states that the owners were *Danish* subjects residing in the *Danish* Island of *St. Thomas*, and that the ship had on board all the papers usually carried by *Danish* ships; and the sentence itself states that the property was neutral and *Danish*. But if it be contended that the sentence which condemns the ship and cargo for a breach of neutrality is conclusive, it may be answered that it is only conclusive as to the grounds on which the sentence itself proceeds, as was said in *Calvert v. Bovill* (a), where the *French* Court of Admiralty having condemned an *American* vessel as good prize for reasons stated in their sentence which this Court thought did not necessarily lead to such a conclusion, they held that such sentence was not conclusive evidence against the warranty of neutrality. Now here the sentence does not negative that the ship and cargo were originally neutral, but only states facts from whence the Court concludes that she afterwards forfeited her neutrality; which facts when examined do not warrant that conclusion. For it is no where stated that *Danish* ships are bound by any treaties with *England* to submit to be searched, much less to be violently taken possession of and carried out of the course of their voyage into our own ports for that purpose. Nor does it appear upon reference to the treaties subsisting between the two countries that any such right exists. [Here the Court intimated their clear opinion that the sentence of condemnation by a Court of competent jurisdiction, having expressly adjudged that the ship by the acts stated had broken her neutrality, and acted contrary to the laws of nations and the faith of treaties, had concluded that question, and that they could not examine into the propriety of the conclusion.] *Park* then referred to the case of *Saloucci v. Johnson* (b) as in point. There a *Tuscan* ship warranted neutral was taken by a *Spanish* vessel and condemned on the grounds that she had refused to be searched and had resisted with force, and that she had no charter-party on board: but this Court held the

(a) *Ante*, 7 vol. 523.(b) *B. R. Trin.* 25 *Geo.* 3. *Park's Insur.* 415.

underwriters liable notwithstanding the sentence, which was unfounded upon the face of it, because by the law of nations (the only law upon which it purported to be founded) a neutral ship was not bound to submit to be searched. This therefore appears on the face of the sentence to have been an illegal act of the captors to which the *Danish* captain was not bound to submit; and consequently the sentence is not conclusive against the warranty of neutrality in this case. But even if such a right of search did exist by particular treaty between the two countries, at most the act of the captain in resisting the search would only amount to barratry, for which the underwriters are liable.

Scarlett contra. In every warranty of neutrality there is an implied undertaking on the part of the assured that the ship shall so conduct herself during the voyage as not by any voluntary act to forfeit the privileges of neutrality, without which such a warranty would be nugatory. This includes an undertaking that the ship shall be navigated according to treaties. The underwriter in these cases receives a smaller premium upon the faith that the risk will be diminished by the character and conduct of the ship in this respect. It follows therefore that if the benefit of neutrality be wilfully forfeited the underwriter is discharged; and he may put that fact in issue. Now here the medium by which he proves it is the sentence of condemnation, which being a sentence of a Court of competent jurisdiction and grounded on that very circumstance is conclusive between the parties. As to the law of nations respecting the right of search, it is at least a disputed point; for *Vatel* (a), after stating that this right was formerly controverted, but had always been insisted on by the great naval powers, and mentioning an instance in which *France* had insisted upon it against *Queen Elizabeth*, concludes with saying that at the time when he wrote resistance of neutral vessels to search was alone holden a ground of condemnation. This case is distinguishable from that of *Saloucci v. Johnson*; for there the sentence of condemnation did not purport, as here, to proceed on the ground of particular treaties; and therefore it was competent to the Court to examine whether the grounds there stated were warranted by the law of nations. But here the sentence expressly alleges that the breach of neutrality was in violation of *the faith of treaties*, as well as of the law of nations; and the Court of Admiralty were the proper judges of the treaties between the countries.

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(a) 3 vol. 144. 8vo French edition.

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After the argument it was observed by the defendant's counsel that there was no count as for a loss by barratry, and therefore the plaintiffs could not at any rate avail themselves of any question of that kind: but that the defendant was ready to wave the want of such a count in order that the opinion of the Court might be taken on the principal question.

Lord KENYON Ch. J. If the parties wish to have a second argument, I shall not object to it; but at present it appears to me that the plaintiff is not entitled to recover, notwithstanding the case of *Saloucci v. Johnson*. That case professed at last to proceed on this ground that the arbitrary ordinances of one country ought not to conclude the rights of other parties, and that courts of justice ought to proceed on the acknowledged law of nations and on the existing treaties between the different states. But that case is important in another point of view; it lays down certain other principles to which I accede, namely, that though it is not necessary that a ship warranted neutral should continue neutral during the whole voyage, because if she be neutral at the time of sailing the breaking out of war on the next day will not discharge the underwriter, yet the ship must not forfeit its neutrality by the misconduct of the parties on board. Now in this case the ship and cargo were warranted to be *Danish*; and the case of *Saloucci v. Johnson* says that a ship, that is warranted neutral, must be so conducted as not to forfeit its neutrality. Then was this ship so conducted? In order to decide that question we must look to the sentence of the Court of Admiralty; that sentence, which we cannot review, has expressly stated "that the master and crew of the ship *Dispatch* in direct violation and breach of their neutrality as *Danish* subjects, and contrary to the law of nations and the faith of treaties, violently" seized and took possession &c. If we had constituted that Court, perhaps we should have drawn a different conclusion from the facts there stated: but we are now concluded by that sentence; and so it was holden in the late case of *Christie v. Secretan*. Therefore conformably to that case, and not contradicting that of *Saloucci v. Johnson*, I think that the defendant is entitled to our judgment. With regard to the question concerning the right of searching neutrals; before the late armed neutrality it was considered in this country, and so decided in many cases, that the right of searching neutrals was part of the law of nations; and it was supposed to be founded on reason.

GROSE

GROSE J.—This ship, though not in terms warranted to be neutral, was so warranted in effect; for she was warranted *Danish*, for the purpose of having the advantages of neutrality. Then if warranted neutral, she should have so conducted herself as not to lose it's neutrality: but, on looking into the sentence of the Court of Admiralty, we find that the only ground of condemnation was her having done a certain act in direct violation and breach of her neutrality and contrary to the law of nations and the faith of treaties. Then for the purpose of this insurance the ship was not *Danish*, and consequently the plaintiffs are not entitled to recover.

LAWRENCE J. The plaintiffs' argument, founded on the case of *Saloucci v. Johnson*, proceeds on a supposition that a point was there decided that was not determined; it was not there decided that this Court can review a sentence of the Court of Admiralty adjudging that a ship has forfeited her neutrality, for there it was not adjudged by the Court of Admiralty that the ship had forfeited her neutrality. But looking into the grounds of this sentence, we cannot but see that the ship was condemned for having violated her neutrality and acted contrary to the law of nations and the faith of treaties. With regard to the other point; there is no count in this declaration for a loss by barratry.

Postea to the defendant.

BUSBY and Another *against* FEARON.

Wednesday.
April 24th.

A RULE having been obtained, calling on the plaintiff to shew cause why the proceedings in this action should not be set aside for irregularity, on two grounds, 1st, Because the writ which was directed to the sheriff of *Northumberland* was served in *Newcastle-upon-Tyne* out of the county of *Northumberland*; 2dly, Because the action ought to have been brought in the Court of Conscience at *Newcastle*, the plaintiff having admitted that the cause of action only amounted to 1*l.* 15*s.*;

Wigley now shewed cause against it. In answer to the first objection, he relied on the case of *Kelly v. Shaw (a)*, where the service of a latitat in *Middlesex* was holden to be good. As to the second objection; he said it did not follow that, because the de-

Service of a writ (directed to the sheriff of *Northumberland*) in *Newcastle-upon-Tyne* held good.

—Plaintiff may sue in this court for a debt under 40*s.* if he cannot sue in any inferior court.

—The Court of Conscience at *Newcastle* can only hold

plea where both the plaintiff and defendant reside within the jurisdiction.

(a) *Ante*, 6 vol. 74.

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 against
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Lord KENYON Ch. J. If the parties wish to have a second argument, I shall not object to it; but at present it appears to me that the plaintiff is not entitled to recover, notwithstanding the case of *Saloucci v. Johnson*. That case professed at last to proceed on this ground that the arbitrary ordinances of one country ought not to conclude the rights of other parties, and that courts of justice ought to proceed on the acknowledged law of nations and on the existing treaties between the different states. But that case is important in another point of view; it lays down certain other principles to which I accede, namely, that though it is not necessary that a ship warranted neutral should continue neutral during the whole voyage, because if she be neutral at the time of sailing the breaking out of war on the next day will not discharge the underwriter, yet the ship must not forfeit its neutrality by the misconduct of the parties on board. Now in this case the ship and cargo were warranted to be *Danish*; and the case of *Saloucci v. Johnson* says that a ship, that is warranted neutral, must be so conducted as not to forfeit its neutrality. Then was this ship so conducted? In order to decide that question we must look to the sentence of the Court of Admiralty; that sentence, which we cannot review, has expressly stated "that the master and crew of the ship *Dispatch* in direct violation and breach of their neutrality as *Danish* subjects, and contrary to the law of nations and the faith of treaties, violently" seized and took possession &c. If we had constituted that Court, perhaps we should have drawn a different conclusion from the facts there stated: but we are now concluded by that sentence; and so it was holden in the late case of *Christie v. Secretan*. Therefore conformably to that case, and not contradicting that of *Saloucci v. Johnson*, I think that the defendant is entitled to our judgment. With regard to the question concerning the right of searching neutrals; before the late armed neutrality it was considered in this country, and so decided in many cases, that the right of searching neutrals was part of the law of nations; and it was supposed to be founded on reason.

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GROSE J.—This ship, though not in terms warranted to be neutral, was so warranted in effect; for she was warranted *Danish*, for the purpose of having the advantages of neutrality. Then if warranted neutral, she should have so conducted herself as not to lose it's neutrality: but, on looking into the sentence of the Court of Admiralty, we find that the only ground of condemnation was her having done a certain act in direct violation and breach of her neutrality and contrary to the law of nations and the faith of treaties. Then for the purpose of this insurance the ship was not *Danish*, and consequently the plaintiffs are not entitled to recover.

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BUSBY and Another *against* FEARON.

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April 24th.

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Service of a writ (directed to the sheriff of *Northumberland*) in *Newcastle-upon-Tyne* held good.

—Plaintiff may sue in this court for a debt under 40*s.* if he cannot sue in any inferior court.

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(a) *Ante*, 6 vol. 74.

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mand was less than 40s., the plaintiff could not sue in the superior courts; to deprive him of his right of suing here it should appear that he might have sued in an inferior court. *Tubb v. Woodward*, *Ante*, 6 vol. 175, and *Welch v. Troyte*, 2 *H. Bl. Rep.* 29. But here, as the cause of action arose in *Middlesex* and the defendant resided at *Newcastle-upon-Tyne*, the plaintiff could not have sued in the court at *Newcastle*, the cause of action not arising within the jurisdiction of that court.

Wood, in support of the rule, insisted 1st, That a writ which was directed to the sheriff of one county had no force out of that county; and 2dly, That though the common law courts, (e.g. county courts) could only hold plea where the cause of action arose within the jurisdiction, yet that in the Courts of Conscience created by act of parliament the plaintiff may sue the defendant if the latter reside within the jurisdiction. And if so, that the Court would stay the proceedings here, the debt being under 40s. *Kenward v. Jones*, *ante*, 4 vol. 495; and *Wellington v. Arters*, *ante*, 5 vol. 64.

The Court, on the authority of the case of *Kelly v. Shaw*, overruled the first objection: but, it not appearing what jurisdiction the Court of Conscience at *Newcastle* had, the matter stood over to a future day. On the last day of the term it was stated that by the terms of the act of parliament, creating the court at *Newcastle*, that Court could not hold plea unless both the plaintiff and the defendant resided within the jurisdiction, and therefore the Court discharged the rule, the plaintiffs in this action residing in *Middlesex*.

Rule discharged.

Wednesday,
April 24th.

The KING against The Inhabitants of SAINT MARY LAMBETH.

A master, being obliged to leave his house seven days before the end of a year for which he had

hired a servant, told the latter that he had no further occasion for her services, and paid her the whole year's wages: the master would otherwise have kept her, and she was unwilling to leave the service:—Held a dispensation of the service for the rest of the year.

THE Court of Quarter Sessions for the county of *Surry* quashed an order of two justices, by which *Mary Walton* was removed from *Saint Mary Lambeth* to *Saint Martin-in-the-Fields*, and stated the following case for the opinion of this Court.

The

The pauper *M. Walton* a single woman, being legally settled in the parish of *Saint Martin*, on the 15th of *January* 1797 hired herself to one *T. Serle* of the parish of *Saint Paul Covent-Garden* in the county of *Middlesex* for a year from the 18th of that month at the wages of seven guineas; she went into his service on the 18th of *January*, and continued in it until the 11th of *January* following, when an information having been laid against her master for keeping a gaming-house he quitted his house and told his servants (and the pauper amongst them) that he had no longer any occasion for their services, and then paid the pauper her whole year's wages. The master would have kept the pauper but on account of his being so obliged to quit his house, and the pauper was unwilling to leave his service. She then left her master's house and went to her sister's, and did not engage herself in any new service until after the year expired, though from the time that her wages were paid she considered herself at liberty to go where she pleased.

Garrow and *Marryat* in support of the order of Sessions. The question in this case is whether the master dispensed with the pauper's service for the last seven days in the year, or whether both parties agreed to put an end to the relation of master and servant before the expiration of the year. Now it is manifest from the case stated that neither party wished to put an end to the contract, it being expressly stated that the master would have kept the pauper had he not been obliged to quit his house, and that the pauper was unwilling to leave his service. And the circumstance of the master paying the whole year's wages shews that the master and servant acted upon the supposition that they were bound by their contract to the end of the year; although the master on account of his own situation dispensed with any further service. And these cases were relied upon; *R. v. The Inhabitants of Richmond*, *Burr. S. C.* 740.; *R. v. The Inhabitants of Saint Bartholomew*, *Cald.* 48.; *R. v. The Inhabitants of Saint Philip Birmingham*, *ante*, 2 vol. 624.; and *R. v. The Inhabitants of Saint Andrew Holborn*, *ib.* 627.

Fielding and *Best* contra. The present case is distinguishable from those cited. In *R. v. Saint Philip Birmingham* Mr. *J. Ashurst* said there was no evidence of the consent of the servant to dissolve the contract; "it was a wrongful act of the mistress, which was submitted to, but not agreed to, by the servant." And the case of *Saint Andrew Holborn* was decided on the same ground. But whatever rule may formerly have prevailed on this subject,

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all the cases cited on the other side have been considered by this Court in several late determinations, in which (as well as in a prior case *R. v. Castlechurch*, *Burr. S. C.* 68.) a contrary line of decision was adopted, the Court strongly leaning against constructive services. Those late cases are *R. v. Gresham*, *ante*, 1 vol. 101; *R. v. Grantbam*, *ante*, 3 vol. 754; *R. v. Claybydon*, *ante*, 4 vol. 100; and *R. v. Whittlebury*, *ante*, 6 vol. 464. In the first of them the master insisted on turning away the servant and threw down his wages which the latter took up and went away, staying away six days; this was holden to be a dissolution of the contract; the Court saying that the payment of the wages by the one and acceptance by the other shewed the consent of both to put an end to the contract. In the second the master turned the servant out of doors three days before the end of the year, and the next day paid the servant his wages to the end of the year on the servant's threatening him; and it was ruled that the contract was thereby dissolved though the servant left the master's service "contrary to the express request of the master," the Court saying there was no *animus revertendi* in the servant. In the third case the servant went away a few days before the end of the year, without leave to get another place, on his return the master insisted on turning him away and paid the wages up to that time; that was holden to be a dissolution of the contract, "though the servant wished to have stayed out the year." There Lord *Kenyon*, after lamenting that the words of the act of parliament had not been strictly adhered to in these decisions, said "But I do not know that it has ever been decided that a settlement was obtained *unless by construction the relation between master and servant continued during the whole year*"; and his Lordship relied on that which was the ground of decision in *R. v. Gresham*, saying "both parties did that which put an end to the contract; the one paid and the other received the wages." In the fourth case above alluded to, the servant being taken ill five days before the end of the year went to his mother's and sent for his wages, which were paid, except 1s. which was deducted for the remainder of the year; and that was holden to be a dissolution of contract. These late cases (a), therefore, shew that the circumstances of the servant leaving the master and actually receiving his wages before the end of the year have been considered as decisive proof of the intention of both

(a) See also *R. v. Thistleton*, *ante*, 6 vol. 185.

parties to dissolve the contracts, whatever wishes may have been entertained by either party before. Both those circumstances concur in the present case; and after the payment of the wages the servant was no longer under the control of the master. During the last seven days she certainly was not in the actual service of the master; nor was she constructively in his service, because he could not have compelled her to return to him.

LORD KENYON Ch. J. If this point were not encumbered with decisions, and we were to resort to the words of the act of parliament on which the question arises, I should perhaps yield to the arguments of the counsel in support of the rule. Or if the cases cited by them proved the point for which they were cited, I should be strongly inclined to adopt them on this occasion. But it has been frequently said here that it is of great importance that decided cases should be adhered to; and on this subject in particular I applaud the rule stare decisis. The cases cited by the counsel on both sides are nine in number; and though they approach each other very nearly, there is a line of distinction between the four that were relied upon by the one side and the five that were cited by the other. I cannot distinguish the present case from the four that were cited by the counsel in support of the order of Sessions; and it was decided in each of those that it was a dispensation with the service and not a dissolution of the contract. Perhaps I should have had some difficulty in saying in some of those cases that it was only a dispensation with the service: but it is sufficient to say that those cases were so decided, and having been so determined they ought not now to be shaken. But the cases cited by the counsel on the other side are distinguishable from those, because in them the contract was dissolved by the mutual consent of both parties. The distinction between the different sets of cases is certainly a very nice one: but I think that this case must be governed by the four to which I first alluded; and if this be a question of evidence, it appears that the Sessions, by their determination, have impliedly found that the parties did not consent to dissolve the contract.

GROSE J. I have frequently wished that, in decisions on this subject, the Court had always been as strict in requiring a service for the whole year as they have been in requiring a hiring for a year, because then no question could have arisen on constructive services. As however a different rule has been pursued, and as nice distinctions have been introduced in cases of this kind, in de-

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ciding this case we must endeavour to find out and adopt that case which most resembles the present. And I think that this most resembles the four cases that were first cited. In some respects this is like that of *R. v. St. Philip Birmingham*; for I consider that the servant was wrongfully turned away; the master could not continue any longer in his house, and the servant insisted on having her whole year's wages, and though she received all her wages she was unwilling to leave the service: now if it be considered that she was dismissed against her consent, there could be no dissolution of the contract by the consent of both parties.

LAWRENCE J. I think that the four cases first alluded to ought to govern the present.

Lord KENYON then expressed a wish that the justices at the sessions would in future find the fact whether or not the parties put an end to the contract before the expiration of the year.

Order of Sessions confirmed.

Wednesday,
April 24th.

The KING against The INHABITANTS of ST. MARY
LAMBETH.

A man had a tenement of above 10*l.* a-year in *A.* in which he generally and his wife and family constantly resided for several years, but he occasionally slept in *B.* where he had another tenement under 10*l.* a-year, which he had lately taken for the more convenient carrying on of his business; and upon the whole he slept in *B.* above 40 days, and particularly on the last night when both the tenancies expired: held that his settlement was in *B.*

TWO justices by an order removed *John Taylor* from the parish of *St. Olave* to the parish of *St. Mary Lambeth*, both in the county of *Surry*. The Sessions on appeal confirmed the order, subject to the opinion of this Court on the following case.

John Taylor the pauper about four years ago took a tenement at the yearly rent and value of 12 guineas in the parish of *St. Mary Lambeth*, and continued tenant thereof until the 29th of September 1797. He resided in that tenement with his wife and family from the time of taking it until the 24th of June 1797, when he took a lodging for the convenience of his business, at the rent of 8*l.* 10*s.* a-year, in the parish of *St. Mary-le-Bone*, where he occasionally slept, leaving his wife and family at the house in *Lambeth*. Both tenancies expired on the 29th of September 1797. The pauper slept sometimes in *Lambeth* parish, and sometimes at his lodgings in *St. Mary-le-Bone*, and for above 40 days in the whole upon the tenement in *St. Mary-le-Bone*; and he slept there the last 30 nights of that tenancy. His wife and family never accompanied him, or

slept

slept at the lodging in *St. Mary le-Bone*, but remained at the house in *Lambeth* until about three weeks previous to *Michaelmas-day* 1797, when she went away and took the furniture away with her. The Court of Quarter Sessions were of opinion that the pauper's settlement was in *St. Mary Lambeth*.

Lawes, in support of the order of Sessions, said that the pauper's home during the whole time of the tenancies remained in *St. Mary Lambeth*, where his wife and family were, and his sleeping in *St. Mary-le-Bone* was only accidental and occasional; which distinguished this from other cases of the like kind. But

The Court said there could be no doubt but that the pauper's settlement was in the parish of *St. Mary-le-Bone* where he had a tenement of above the annual value of 10*l.* when joined to the other in *Lambeth*, and in which former tenement he had resided on the whole above forty days, and where he had slept the last night. The question was too plain for argument.

Fielding and *Best* were to have argued against the order of Sessions.

Both orders quashed.

The KING against NEALE.

Saturday,
April 27th.

THIS was a conviction by two justices against the defendant on the 5 *Geo. 2. c. 20.* for piloting the ship *Nostra Signora* up the river *Thames* without being duly licensed. The conviction stated that the defendant on the 22d of *January* 1799 at &c. did unlawfully take upon himself the charge of the ship *Nostra Signora* belonging to *Corunna* in *Spain* &c, then and there being employed in the foreign trade and entered at the Custom-House *London* inward from *Corunna* aforesaid, (negating the ship's being employed in the coal trade or other coasting trade) as a pilot up the river *Thames*, he the said defendant not being then licensed by the Master Wardens &c of the *Trinity-House*; contrary to the form of the statute &c, whereby the said defendant had forfeited 20*l.* &c.

It is only necessary to have a regular pilot (under 5 *Geo. 2. c. 20.*) when a vessel is sailing on the *Thames* in the course of her navigation.

—Having finished her voyage, any other person may remove her from one part of the river to another.

It appeared by the evidence, which was stated at large in the conviction, that the vessel had been piloted up the *Thames* by a regular pilot of the name of *Ross* to *Limehouse-Hole*, where he left her before she was moored; that she was forced upon the mud there by a southerly wind, and lay there for four days in a very awkward situation; that she lay a-ground with the stock of her anchor under

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under her bottom on the fourth day, and there was great danger in leaving her there till the tide ebbed again. It further appeared that for three days previous to her being moved application had been made for pilots for several other ships (though not for this vessel) but none could be found. That under these circumstances the consignee of the vessel in question employed the defendant, who was a waterman and not a pilot, to remove her from *Limehouse-Hole* to *Cherry-Garden-Stairs* which lies further up the river about a mile and an half, which was accordingly done, (the evidence being that he *unmoored* her &c,) the defendant managing the helm, but no canvass being up; and that she was properly moored there by the defendant. It was further stated that the navigation of the river from *Limehouse-Hole* to *Cherry-Garden-Stairs* is very difficult and dangerous, but that no accident happened upon this occasion; and that the vessel might have been removed to the pier either immediately above or below *Limehouse-Hole* and have been perfectly safe without going any further. The justices upon this evidence convicted the defendant in the penalty of 20*l*.

Marryat for the defendant referred to the case of *The King v. Lambe* (a) as decisive of the present. That indeed was a conviction for piloting a ship *down* the *Thames* without license, and this is for piloting *up* the *Thames*: but the same construction of the two acts of parliament (b) on this subject which the Court then adopted applies equally to the present case; namely, that those acts only attach on ships in the course of their navigation on the river. Here the vessel had complied with the legislative regulation in taking in a licensed pilot at the outward terminus to bring her up to *Limehouse-Hole*; and it ought not to be objected to the defendant that, because the pilot had neglected his duty in not mooring her properly, he was not at liberty afterwards to navigate the vessel into a place of safety without the owners being obliged to incur again the expence of another pilot. He also stated an objection in point of form to the conviction, that the information did not negative that the defendant was a *Dover* or *Deal* pilot (c), but only alleged that he was not a pilot of *Deptford Strond*, though the former are licensed as well as the latter. But he said he was the less anxious to insist upon this ob-

(a) *Ante*, 5 vol. 76.

(b) 3 *Geo.* 1. c. 13. and 5 *Geo.* 2. c. 20.

(c) *Vide* s. 12. of the last statute which

refers to and saves the privileges granted to these pilots by the former statute.

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jection, as it was the wish of the ship-owners to establish their right by the judgment of the Court to move their vessels from one place to another in the river without incurring the expence of employing a licensed pilot, which is very considerable.

Best contra. As to the objection of form; it is only necessary in the information to negative those qualifications which are introduced in the enacting clause creating the offence and giving the penalty: but the qualification referred to is introduced in a subsequent proviso referring to a former act, and therefore can only be insisted on as a matter of defence. He avowed that the object of this conviction was to assert the general question of right on behalf of the licensed pilots; but he contended that this case was distinguishable from that of *R. v. Lambe*. There the ship was not in the course of her voyage, but had completed it, and had discharged part of her cargo: here she was still in the course of her voyage, never having been brought to her proper moorings. There too, the vessel was only moved a small distance down the river by her own crew; whereas here the defendant was employed in the special character of a pilot for the purpose. This case comes within the general mischief against which the Legislature intended to guard, namely, the danger to the lives and property of the subjects from unskilful persons attempting to navigate vessels upon the *Thames*, the navigation of which was known to be very hazardous, and is so stated by the Legislature in the preambles to the statutes in question. But the construction contended for goes to exclude the whole of the river from the operation of the law, although that was the principal object of the regulation. The termini mentioned in the act of *Geo. 2.* are not named as connected merely with foreign voyages, but for the express purpose of including every vessel navigating within those limits; and the naming of them does not indicate that the ship must pass beyond them. Where an offence is created within a particular jurisdiction, it is not necessary that the party should offend over the whole district, but an offence committed within any part of it subjects him to the penalty. The necessity for the regulation is stronger within than beyond the limits of the river, because the dangers of shoal water and narrow passages where vessels may meet are greater. But the object of the Legislature would be defeated if, when a ship was once brought into the river, she might afterwards be navigated within the limits by unskilful persons. And the words

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of the act of *Geo. 2.* seem to exclude such a construction; for they first exclude the navigating of vessels by unlicensed pilots "down the river *or* through the north channel &c," and the like construction must take place with respect to piloting *up* the *Thames*. The word *or* is there exclusive of the subsequent words of description; so that the navigating up or down the *Thames* is not necessarily connected with foreign voyages.

LORD KENYON Ch. J. If it were necessary for us to expound the act of parliament according to the prosecutor's construction, I think that the act ought to be immediately repealed. It appears that the ship in question was piloted up the river *Thames*, and after the pilot left her was moored, that she was afterwards in imminent hazard of being lost, that though inquiries had been made for three days before for other ships no pilot was to be found, that the defendant, who was competent to the purpose, was employed to remove her from a place of danger to a place of safety, and that he accordingly removed her without setting a sail and without doing an injury to any other vessel; and now this is complained of as a crime within the act of parliament that has been alluded to. To be sure if the law in express terms said that this was an offence, we must so adjudge it, leaving it to the Legislature to make such alterations in the law as to them might seem proper. Not many years ago the case of *R. v. Lambe* was determined by us; and I take it for granted that the present case is brought forward in order to give us an opportunity of reviewing the judgment which we then gave; I have reviewed that opinion, and still think that that case was properly decided; and I am also clearly of opinion that it is a case in point for this purpose. It would be a monstrous proposition to establish that not one of the numerous vessels lying in the *Thames* could be removed one yard in the river without a licensed pilot; and yet that would be the necessary consequence of the construction of the act contended for by the prosecutor in this case.

GROSE J. I adhere to the opinion we gave in the case of *R. v. Lambe*. An attempt however has been made to distinguish that case from the present by saying that there the vessel was not in the course of her navigation, whereas here she was: but that distinction is not founded in fact; from the facts here stated we must understand that the ship had been moored before she was moved by the defendant, for it is stated that he unmoored her.

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This ship had been navigated up the river as far as *Limehouse Hole* by a regular pilot; being afterwards in a dangerous situation the defendant removed her to a place of safety, and it is said that by so doing he has incurred a forfeiture under the act of parliament; but I am clearly of opinion that he has not.

LAWRENCE J. According to the prosecutor's construction of this act the case of *R. v. Lambe* was improperly decided; for according to his construction a vessel cannot be moved in any part of the river without a regular pilot. But I think that the Court in that case put the true construction upon the act of parliament; and there it was ruled that it is only necessary to have a regular pilot on board when the ship is going up or down the river in the course of her navigation. I collect from the evidence given in this case that the voyage was finished before the defendant removed the ship; for it is stated that she was left at *Limehouse Hole*, and though it is not stated in express terms that *Ross* moored her there, she must have been moored there by some person, because it appears that the defendant unmoored her. But the prosecutor's argument is that if a vessel be driven on the mud in the river, she must be left there to be wrecked unless a regular pilot can be procured to get her off, and that if any other person remove her to a place of safety he is guilty of an offence within this act of parliament: but that is too preposterous a construction to put upon the statute.

Per Curiam

Conviction quashed.

JACKS *against* MAYER.

Monday,
April 29th.

THIS cause was to have been tried in last *Hilary* term, but the trial was put off until this term by rule of court, though by mistake it was marked by the marshal as a remanet. The cause was tried at the first sittings in this term, no new notice of trial having been given; whereupon a rule was obtained, calling on the plaintiff to shew cause why there should not be a new trial, which was now made absolute.

The Court said that the distinction was this; if a cause be made a remanet, it may be tried at the next sittings without any other notice: but if the trial be put off by rule of court, there must be a fresh notice of trial. And they said that even when a plaintiff gives

If a cause be made a remanet, no new notice of trial need be given; aliter where the trial of the cause is put off to the next sittings or assizes by rule of court.

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gives a peremptory undertaking to try at the next sittings or assizes, there also a new notice of trial must be given (a), because notwithstanding such undertaking the plaintiff may decline trying his cause.

Rule absolute.

(a) *Monk v. Wade*, Tr. 29 Geo. 3. B. R. S. P.Tuesday,
April 30th.

WILLIAMS against EVANS.

The Mayor and Common Council of the borough of Carmarthen have power to admit to the freedom of the borough such of the inhabitants paying scot and lot, who for three years previous have rented lands within the borough for which they have paid

10*l.* a-year; the defendant, an inhabitant of that description, was nominated a *burgess* accordingly, (by which title the corporators are called;) held that a *burgess* so appointed is within the prohibition of the act of 3 Geo. 3. c. 15. against occasional *freemen* voting at elections; and that the defendant having voted within the 12 months after he was sworn in was liable to the penalty of 100*l.* imposed by the act, although he had been nominated to be a *burgess* for more than six years before.

(a) "Entitled an act to prevent occasional freemen from voting at elections of members to serve in parliament for cities and boroughs." S. 1. after reciting that great abuses had been committed in making freemen of corporations in order to influence elections of members to serve in parliament, to the great infringement of the rights of freemen of such corporations and of the freedom of elections, enacts "That from and after the 1st of May 1763 no person claiming as a freeman to vote at any election of members to serve in parliament for any city town port or borough in England, Wales, and the town of Berwick upon Tweed, where such voter's right of voting is as a freeman only, shall be admitted to give his vote at

such election, unless such person shall have been admitted to the freedom of such city town port or borough 12 calendar months before the first day of such election; and if any person shall presume to give his vote as a freeman at any election of members to serve in parliament contrary to the true intent and meaning of the act, he shall for every such offence forfeit and pay the sum of 100*l.* to him who shall inform and sue for the same; and the vote given by such person shall be void and of no effect." S. 2. "Provided that nothing therein contained shall extend to any person entitled to his freedom by birth, marriage, or servitude, according to the custom or usage of such city town port or borough."

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the 1st of *May* 1763, and within twelve calendar months next before the exhibiting of the plaintiff's bill, to wit, on the 27th of *May* 1796 at &c. before the election was finished claimed as a burges of the said county of the said borough to vote at such election &c., and then and there gave his vote at the said election as a burges &c. for the said *J. G. Phillips*, &c; when in truth and in fact the defendant had not before the first day of the said election been admitted to the freedom of the said county of the said borough twelve calendar months, nor was otherwise entitled to his freedom by birth marriage or servitude according to the custom and usage of the said county of the said borough, contrary to the form of the statute &c; whereby &c. There was a second count like the former, excepting that the place was called the borough of *Carmarthen*. The defendant pleaded nil debet; and at the trial before *Heath J.* at the last Summer Assizes at *Hereford* a verdict was found for the plaintiff for one penalty, subject to the opinion of this Court on the following case.

His present Majesty by his letters patent under the Great Seal dated the 27th of *July* in the 4th year &c, (after reciting that the borough of *Carmarthen* from time immemorial had been a borough or town corporate; and that King *James I.* by his charter granted ordained and declared that the borough of *Carmarthen* should from thenceforth be a county of itself, and should be called the county of the borough of *Carmarthen*; and that the mayor, burgeses and commonalty of the said borough should have instead of the bailiffs of the said borough two sheriffs in the same borough and precincts and county of the borough of *Carmarthen* aforesaid; and confirmed to the said mayor burgeses and commonalty of the borough of *Carmarthen* all the privileges immunities exceptions and jurisdictions whatsoever, and also all and singular the manors &c which the said mayor &c of the borough or their predecessors had enjoyed; and also reciting that divers disputes had of late arisen within the said borough and county of the borough of *Carmarthen* aforesaid, and that informations in the nature of writs of quo warranto had been prosecuted in his said Majesty's Court of King's Bench and judgment of ouster obtained against most of the acting magistrates and officers of the said corporation, whereby the same corporation was then dissolved or at least incapable of exercising and enjoying the said liberties and franchises,) granted constituted confirmed and declared that the said borough

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of *Carmarthen* should and might remain and be for ever thereafter a free borough of itself and terminated by its ancient metes and bounds; and that the burgeses of the said borough, by whatever names of incorporation they had been called, should be a body corporate &c by the name of the mayor burgeses and commonalty of the borough of *Carmarthen*. The charter then ordained that no persons should be entitled to be admitted a burges of the said borough, except such person who for three years or more before his application to be admitted a burges of the said borough had been seised and possessed by himself or his tenants of an estate of freehold for the term of his life or some greater estate of and in messuages lands &c. situate within the said county of the said borough, of the yearly value of 4 *l.*, and except such person who at the time of such application to be admitted a burges of the said borough should be seised and possessed by himself or tenants of messuages lands &c. within the county of the same borough of such estate of such yearly value as aforesaid, which had come to him by descent or marriage, and also except every person who should have been bound by indenture and served as an apprentice for seven years or upwards to and with any burges of the said borough who during the said term had been usually resident within the same borough; which said person so qualified as aforesaid, whether in right of freehold or servitude, should be entitled to be admitted a burges of the said borough; so as such person should make application for that purpose to the mayor and commonalty of the said borough on *Monday* next after *Michaelmas* in each year, and at no other time; and so as such person should then and there before the said mayor and commonalty make due and legal proof of such his qualification as aforesaid. And it was further ordained that upon such proof being so made such person should thereupon be admitted and sworn a burges of the said borough at the next or any subsequent fortnight court to be holden in and for the said borough after such day on which he should so make his claim as aforesaid. The charter further ordained that the mayor and common council of the said borough for the time being or the major part of them in common council assembled on the said *Monday* next after the feast of *Saint Michael* in each year, and at no other time, should and might at their discretion receive application and make order

for the admitting of such of the inhabitants of the said borough paying scot and lot who in consideration of their good behaviour should be thought deserving to be burgeses of the said borough, so as such persons so applying should for three years then last have rented holden and occupied and did then rent hold and occupy messuages lands &c within the said borough and county of the borough aforesaid, of which during all that time they had bonâ fide paid the yearly rent of 10*l.*, and that upon proof thereof being made to the satisfaction of the said mayor and common council or the major part of them such persons should and might by such order as aforesaid at the discretion of the said mayor and common council or the major part of them thereupon to be made be admitted and sworn burgeses of the said borough at the second fortnight court to be holden in and for the said borough after such day on which they should have so made their applications as aforesaid or at any subsequent court. The charter also granted confirmed and declared that the said borough of *Carmarthen* should be and remain a county of itself, and should be called the county of the borough of *Carmarthen* for ever, and that the sheriffs should have the exclusive execution and return of writs. And all the former rights and privileges of the borough were confirmed. The case then stated that on the 21st of *May* 1796 a writ issued for an election of a member to serve in parliament for the said borough of *Carmarthen* directed to the then sheriffs of the said county-borough; which writ was delivered to them on the 23d; and the election was duly had on the 27th of the same month. That Mr. *Magens* and Mr. *Phillips* were candidates at the election; and that the defendant on the 27th of *May* 1796, and within twelve months before the exhibiting of the plaintiff's bill, voted at the election for Mr. *Phillips*. That on *Monday* next after *Michaelmas* 1789, being six years and upwards previous to the election, the following order was made and signed by the mayor and major part of the common council of the borough in common council assembled, upon the petition of the defendant to be admitted a burges of the borough (viz.) "Whereas *D. Evans* (the defendant) and others having this 5th of *October* 1789 made application to us, praying to be admitted burgeses of the said borough by their petition in writing signed by them respectively, setting forth that they are inhabitants paying scot and lot, and for three years last past have rented holden and occupied messuages and lands within the said borough as specified by their petition, for which said messuages

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houses and lands so holden rented and occupied they have respectively paid and now do pay and for three years past bonâ fide paid the yearly rent of 10*l.* and upwards; now we the said mayor and major part of the common council having received sufficient proof thereof do in consideration of the good character and behaviour of the said petitioners think them deserving to be burgeses of the said borough; It is therefore ordered that the said *D. Evans* (and the others) be admitted and sworn burgeses of the said borough at the second fortnight court after this day or at any other subsequent fortnight court to be holden for the county of the borough aforesaid;” signed by the mayor and major part of the common council of the said borough. But the defendant was not sworn and inrolled as a burges until the 15th of *February* 1796. When any person is ordered to be admitted, the order for the admission gives a right to the person to be admitted and sworn in a burges of the said borough at any fortnight court of the said borough after such order. The right of voting for the election of members of parliament for the said borough is in the persons admitted as burgeses to their freedom under the charter as aforesaid; and there is no other description of persons in the borough but burgeses; and all the burgeses who have been admitted to their freedom and sworn within the year have voted at the election within the year. They are not called freemen but burgeses; and are always said to be admitted to their burgesship. No order can be made for the admitting of any burges but on the day, namely, on *Monday* after *Michaelmas*. The defendant was an *ex gratiâ* burges. By his said present Majesty’s letters patent the mayor recorder and town clerk of the said borough or any two of them are to hold before them within the said borough on every *Monday* from fifteen days to fifteen days a court of record, that is, the fortnight court above mentioned.

Mills for the plaintiff. Though the defendant is called a *burges* of *Carmarthen*, yet he voted at the election as a *freeman* within the words and meaning of the act of the 3 *Geo.* 3. And though *Carmarthen* is called a *county-borough*, because erected by charter into a county of itself, yet that will not alter the right in which the burgeses vote, because the same charter reserves all the ancient rights; and throughout the charter they are still called *burgeses of the borough*. Besides, the cities of *Norwich* and *London*, which are also counties in themselves, are excepted by the 8th clause of the act from the operation of the general words; which shews

that otherwise they would have been deemed to fall within those words. And the reason of those two places being excepted was because before the act passed no person could vote there without having been admitted a year before. The abuse which prevailed before the passing of the act was that persons not having a previous right of admission to the freedom of corporations by birth, marriage, or serving apprenticeships, were upon the eve of an election made freemen for the purpose of such election. Now both the mischief and the remedy apply as strongly to the case of such a borough as *Carmarthen*, though the corporators are called *burgesses*, as to other places where they are called *freemen*. Such persons also are included in the words of the act; for it appears that the burgesses of *Carmarthen* vote in right of having been admitted to their *freedom*. The act of parliament indeed only mentions *freemen*; but that is because *freemen* is the generic term, and includes every description of corporators by whatever name called who claim to vote by reason of having been admitted to their freedom. In this respect *burgess* and *freeman* are synonymous terms; they were so considered in the *Carlisle*, *East-Retford*, and *Colchester* cases (a); throughout *Wales*, and at *Bristol*, *Brackley*, *Lymington*, *Marlborough*, and other places (b), the corporators vote under the name of *burgesses*; and in some places, as at *Worcester* (c), under the name of citizens; and yet it could never have been in the contemplation of the Legislature to exclude all those places from the operation of the act: and that argument applies with peculiar force as to *Wales*, to which the act in terms extends, though in no borough within that part of the kingdom do the corporators vote under the title of *freemen*, but under that of *burgesses*. A *burgess*, according to *Spelman* (d), means no more than the inhabitant of a burgh or of a walled or inclosed town. In *Madox's Firma Burgi* three definitions of it are given, 1st, That of a *freeman corporate*; 2d, An inhabitant of a burghage tenement; 3d, The owner of a burghage tenement: the first of these exactly applies to the present case; it is the inhabitant of a borough clothed with a corporate character. Then it may be objected that the act did not mean to include persons voting within the year who were admitted by virtue of previous qualifications. It appears that there are two classes of persons having a right to vote in this borough. First, The de jure burgesses, who claim in right of

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(a) Vid. *Simeon on Elections*, Appendix 55, 56, 57, and 62.

(b) *Ib.* 53, 54, 71, 72.

(c) *Ib.* 89.

(d) *Gloss. tit. Burgum.*

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freehold estate or servitude; secondly, The *de gratiâ* burgessees, the latter of whom (among which is the defendant) are admitted according to the discretion of the mayor and common council. It is true the exercise of that discretion is limited to persons of a certain description; but that does not give those persons any previous right to be admitted; and therefore they do not even come within the equity of the excepted cases in the statute, which are confined to persons having a right to be admitted by virtue of certain previous qualifications. But it is enough to say that the statute having made certain positive exceptions, of which this case is not one, has thereby virtually excluded all other exceptions from the general rule. But it may be urged that the title of the act being to prevent *occasional* freemen from voting, it does not apply at all to that class of persons, from whom the defendant was chosen, who are required to possess qualifications of a certain standing in point of time, and therefore cannot be said to be *occasional*. But it is sufficient if they fall within the description of the enacting words; and the mischief is as likely to happen in these as in other cases, that they should have the right of voting conferred upon them to answer an occasional purpose. Lastly, it may be contended that, admitting the defendant to fall within the general operation of the act, yet his admission and swearing in shall have relation back to his nomination, which will take him out of the act. But the swearing in alone is the consummation of his right to vote as a burgesse, till which time he cannot be said to be admitted; and therefore having voted within twelve months from such admission he comes directly within the words of the act inflicting the penalty. It is plain that the Legislature looked to the admission and not to the nomination; because there is a penalty given by *§. 3.* for antedating the former but not the latter. So by the *32 Geo. 3. c. 58.* the six years' limitation, beyond which no information in nature of quo warranto can be brought against any member of a corporation for any defect in his original title, runs from the admission and swearing in; because from that time only can he be said to be in the actual holding or execution of the office, which is the description in that act.

Wood contra. The defendant's case does not fall within the penalty of the stat. *3 Geo. 3.*, in construing which the Court will not merely look to the words but the spirit of the law. This is to be collected first from the title of the act, which though no part of it, yet may be resorted to in explanation of its meaning. It is to prevent

prevent *occasional* freemen from voting &c. Now that must mean persons who being originally strangers to the corporation have been made free to serve a particular purpose, without having had any previous qualification or inchoate right to their freedom. The charter of the present King was granted after the act passed, and with reference to it; because by it's provisions no stranger can obtain the freedom of this corporation. It is true that the defendant being an *ex gratiâ* burghers, his admission did in the first instance depend on the discretion of the mayor and common council; but that is not an arbitrary discretion, against which only the act meant to provide, but a discretion regulated by the law and custom of the borough; for the selection can only be made out of such as have particular qualifications. It is confined to inhabitants of the borough paying scot and lot, and they must have rented and paid 10*l.* a-year for land in the borough for three years previous, and they can only be chosen on a certain day of the year. Such a person when chosen does not vote in right of his *freedom only*, upon whom alone the act by the very words of it was intended to attach, but also in virtue of his previous qualifications. According to the true construction therefore of the act it should be confined to *freemen only*, namely, such as had no inchoate right, but were chosen by the mere voluntary and arbitrary will of the corporation. But a burghers implies an inhabitant, and a freeman need not necessarily be a burghers. At any rate however the order for the defendant's admission having been made six years previous to the election, he can in no sense be considered as an *occasional* freeman so as to have incurred the penalty of the act. The swearing in is a mere matter of form; because after his nomination he had a *right* to be sworn in at any fortnight court, and a mandamus would have issued for that purpose to the corporation if they had refused to swear him in. He had therefore a complete title by relation to the time of his nomination; and such a case is neither within the mischief or the enacting words of the act. And no argument can be drawn from it's not having been specially excepted together with the cases of birth marriage or servitude, because those would otherwise have fallen within the words of the general prohibition, though not within the mischief of it.

Lord KENYON Ch. J. I agree with the defendant's counsel that in deciding this case we must consider not merely the words of the statute but the meaning of the Legislature in passing it. The
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principal ground of argument urged on behalf of the defendant is that he is not a freeman, but only a burges of *Carmarthen*: but it is evident that the Legislature thought that those words have the same meaning. I believe also that *Brady*, on Burghs, treats them as the same. Without however resorting to that, the intention of the Legislature in passing this act of parliament was to prevent strangers, persons who did not belong to the corporation, coming down on the eve of an election to give their votes for members; and it certainly extends to corporators whether called by the name of burgeses or freemen. Then it is said that the defendant had an inchoate right before: but it must be remembered that he had no right whatever until the corporation chose to confer it on him by (what is called) an *ex gratiâ* admission, and that that was not consummated until the swearing in. But this inchoate right cannot assist the defendant: the rule *expressio unius est exclusio alterius* applies to this case; for the only excepted cases of inchoate rights in the second section are those by birth, marriage, or servitude. Great stress also was laid on the circumstance of the corporation having made an order six years before for the defendant's admission: but the words of the act of parliament are that no freeman shall be admitted to give his vote "unless he shall have been admitted to his freedom twelve months before the first day of the election:" the third section of the act inflicts a penalty on persons who antedate admissions, and the fourth section directs that the candidates or freemen may inspect the books in which the admissions of freemen are entered; every part of the act therefore shews that the Legislature thought that the material time to be considered was the time of admission. The only thing that could create a doubt for a moment was the distinction between burgeses and freemen as applied to this kind of case: but I am thoroughly persuaded that in this act of parliament they mean the same; and that the defendant is included in the enacting clause and is not excepted in the proviso of the act. Besides I think that this is a remedial act, and ought to receive a liberal interpretation in order to guard against the mischief.

GROSE J. The principal question is whether or not a burges of *Carmarthen*, chosen as the defendant was, be a freeman within the meaning of this act of parliament; and I am of opinion that he is. I consider the word "freeman" as the genus; and though in different corporations they are called by different names, in
some

some by the name of burgesses, in others by the name of freemen, their meaning is the same for the purpose of this act, which I consider as a remedial law. Then it was said that this defendant did not incur the penalty of the act because there was an order for his admission six years before: it is true he had then a right to be admitted a freeman, but he had no right to vote until he had been admitted for a year.

LAWRENCE J. There is no doubt but that "burgess" means the same as "freeman" within this act. The object of the Legislature, in using the most general term "freeman", was to prevent any argument that might otherwise have been made that one species was not included in the act because not particularly named; and therefore by whatever name the freemen may be called in any particular corporation, this general term will extend to all. It has been argued however that the defendant did not vote as a freeman only, but as being an inhabitant and having 10*l. per annum* &c: but those qualifications did not constitute his right to vote; he voted only as a freeman; and even if he had not had those previous qualifications, he might have voted provided he had been admitted a freeman, though he might have been afterwards ousted of his freedom by a quo warranto for want of them. Even supposing the defendant had an inchoate right by the order for his admission, he could not vote at the election without incurring the penalties of the act; for the instances of the exceptions in the proviso are of persons having an inchoate right; this is not one of them, and we cannot extend the exception to other cases that are not there mentioned.

Postea to the plaintiff.

ETHERSEY *against* JACKSON.

Saturday,
May 4th.

TO debt on bond, the defendant, after craving oyer of the condition, by which it appeared that it was given for the performance of covenants in another deed, pleaded the general issue; on which issue was joined, and notice of trial regularly given for the last assizes for the county of *Worcester*. Afterwards the plaintiff entered a suggestion on the roll, in pursuance of the statute 8 & 9 *W. 3. c. 11.* setting forth the deed abovementioned, and assigned a breach against the defendant in not performing the

After oyer of the condition and non est factum pleaded to debt on bond, on which issue is joined and notice of trial given, the plaintiff may enter a suggestion on the roll and assign

breaches pursuant to the 8 & 9 *W. 3. c. 11.*: but it is irregular to deliver such second issue without a summons and judge's order.

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covenants in that deed, and then four days before the affizes the plaintiff, without a judge's order to amend the former issue, delivered this second issue, and afterwards recovered a verdict at the trial; which

Wigley on a former day moved to set aside for irregularity on two grounds; 1st, That the statute did not warrant entering the suggestion on the roll in this case; for it only gives the plaintiff the liberty of making such a suggestion after judgment, and that in three cases only; namely, on judgment on demurrer, by confession, or nil dicit. And he observed that the plaintiff had no reason to complain that he had now no opportunity of assigning breaches, because he might have set out the condition of the bond and assigned breaches in his declaration. 2dly, At all events the plaintiff was irregular in amending the first issue without a summons and a judge's order for that purpose.

The Court were clearly of opinion that there was no foundation for the first objection. They said that this statute required a liberal and beneficial construction, it being made in advancement of justice, and in ease of defendants. That it was manifest that the Legislature contemplated cases where the plaintiff had not originally assigned breaches in his declaration, which the statute enabled him to supply by entering a suggestion on the record even after judgment; and therefore *à fortiori* it might be done before (a).

Garrow and *Jervis*, who shewed cause against the rule, answered the last objection by saying that the defendant being under the terms of taking short notice of trial, the plaintiff had not been guilty of any irregularity, because the second issue was delivered in time; and that the first issue was not altered, the second issue being merely an addition to the first. But

The Court (after consulting the Master on this point) said that this was irregular; and therefore they made the

Rule absolute.

(a) Vide *Hardy v. Bern*, ante, 5 vol. 636. | 8 & 9 W. 3. c. 11. is compulsory on the
Roles v. Roswell, ib. 538. and *Walcott v.* | plaintiff to assign breaches.
Golding, 8 vol. 126. that the statute of

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Saturday,
May 4th.COWIE, Executrix, *against* ALLAWAY.

GURNEY moved on a former day to enter up judgment on a warrant of attorney which had been given by the defendant to one *John Cowie*, who died in the last vacation, and on behalf of whose widow and executrix this application was now made. But he observed that the warrant of attorney was given to *Cowie* himself, not naming his executors and administrators (a).

The Court entertaining great doubt whether they could grant such an application desired, when they granted a rule to shew cause, that it might not be made absolute as a matter of course.

Gurney, when he now moved to make his rule absolute, admitted that he had not been able to find any case directly in point, but said there were several where the Court, in order to arrive at justice between the parties and to carry their agreement into execution, had granted applications of this sort in terms not exactly corresponding with the terms of the warrants of attorney on which they were founded. *Anonymous*, 1 *Show.* 91. Judgment was entered up against the husband and wife upon a warrant of attorney given by the woman *dum sola* (b). So *Salk.* 400. *Anonymous*. In *Todd v. Todd*, *Barnes* 48., which was much argued and considered, the Court permitted judgment to be entered up at the suit of the survivor of two to whom the warrant of attorney was given. S. P. in *Gladwin v. Scott*, *Barnes* 53, and *Fletcher v. Smith*, 2 *Black. Rep.* 1301.

Marryat, amicus Curiae, mentioned *Wild v. Sands*, 2 *Stra.* 718. to shew that the Court could not grant the motion. And

The Court said they were satisfied that they had no authority to direct the judgment to be entered up under the circumstances. That all authorities of this sort must be strictly pursued, and that they could not supply any supposed omission of the parties. That in a case in 5 *Modern* it is said that such an authority dies with the party. That the utmost extent to which the Courts could go was, according to what was said by Lord *Holt* in a case in *Salk.* 401., that if the party die in the vacation judgment may be entered up before the effoign-day of the subsequent term as of the preceding term.

Rule discharged.

(a) Vide *Coles, Executor, v. Haden*, *Barnes* 4to. 44.(b) Vide *Salk.* 399, *Anon.*

A warrant of attorney to enter up judgment having been given to one who died in the last vacation, the Court refused to enter up judgment thereon in this term on the prayer of his executrix.

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Monday,
May 6th.The KING *against* The Sheriff of MIDDLESEX.

Where bail are put in in due time, an exception must first be entered before the sheriff can be ruled to bring in the body: and the adding bail afterwards does not supersede the necessity of such exception before an attachment can issue against the sheriff on account of the added bail not having justified in time.

CONSTABLE shewed cause against a rule for setting aside an attachment against the sheriff for irregularity. The writ was returnable the first return of the term; bail was put in in due time, but not justified. The sheriff was ruled to bring in the body, which rule expired on the 22d of *April*. On the 19th of *April* notice was given to the plaintiff of added bail, with notice to justify on the 22d; on which day another notice of added bail was served with notice to justify on the 24th. But in the mean time the rule for the attachment was made absolute, on the 23d.

Park, in support of the present rule, said that the bail never having been excepted to the plaintiff could not rule the sheriff to bring in the body, and consequently could not attach him on account of the bail not having justified in time.

Conste observed that there was no occasion to except to added bail, because the same reason did not apply to them as to the original bail, who are to be deemed sufficient pro confesso, by the plaintiff having taken an assignment of the bail-bond (a). *Sed*

Per Curiam, (after consulting the Master.) There is no difference, according to the practice, in this respect between the original and added bail: in neither case can the sheriff be attached on account of the bail not having justified in time, unless they have been excepted to.

Rule absolute.

(a) Vide *Lord Brooke v. Stone*, 1 *Wils.* 223.

END OF EASTER TERM.

C A S E S

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ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Thirty-ninth Year of the Reign of GEORGE III.

In this term Mr. Justice ASHHURST resigned his seat on the Bench in this court, and was succeeded by *Simon Le Blanc* Esq. one of his Majesty's Serjeants at Law, who was knighted and took his seat in court on the sixth of June.

On the last day of this term *John Lens* Esq. of *Lincoln's-Inn*, and *John Bayley* Esq. of *Gray's-Inn*, were called to the Honorable Degree of Serjeant at Law; the motto on their rings was

"*Libertas sub rege pio.*"

HADLEY *against* CLARKE and Others.

Tuesday,
May 28th.

IN assumpsit the declaration stated that the defendants were owners of the ship *Pomona*, and that in consideration that the plaintiff had caused divers goods to be shipped on board the said

The defendants contracted to carry the plaintiff's goods from *Liverpool* to

Leghorn; on the vessel's arriving at *Falmouth* in the course of her voyage an embargo was laid on her "until the further order of Council;" held that such embargo only suspended, but did not dissolve, the contract between the parties; and that even after two years, when the embargo was taken off, the defendants were answerable to the plaintiff in damages for the nonperformance of their contract.

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ship then bound on a voyage from *Liverpool* to *Leghorn*, with liberty to proceed singly to *Falmouth* and such other ports as might be necessary in order to join convoy, the defendants undertook for a stipulated freight to deliver the said goods at *Leghorn*, the dangers of the seas only excepted; that the ship afterwards sailed from *Liverpool* to *Falmouth* to join convoy, and that after arriving at *Falmouth* on the 30th of *June* 1796 she abandoned the voyage and returned from *Falmouth* with the said goods to *Liverpool*; whereby the plaintiff was not only deprived of the benefit of having his goods carried to *Leghorn*, but also of divers policies of assurance which he had caused to be effected upon the said goods for the said voyage, and for which he had expended 297*l.* 18*s.* There were also common counts. Plea, The general issue. At the trial at *Guildhall* before Lord *Kenyon* a verdict was found for the plaintiff for 297*l.* 18*s.*, subject to the opinion of this Court on the following case.

In *June* 1796 the plaintiff shipped goods of the value of 1768*l.* on board the *Pomona*, whereof the defendants were owners, to be carried from *Liverpool* upon a voyage mentioned in the declaration, and procured the goods so shipped to be insured for the voyage from *Liverpool* to *Leghorn*, and paid 297*l.* 18*s.* for premium thereon, including the charges of brokerage and the policy. The ship afterwards sailed from *Liverpool* with the goods of the plaintiff and other shippers on board, and proceeded to *Falmouth* to join convoy for the voyage to *Leghorn*. She arrived at *Falmouth* on the 30th of *June* 1796; and during her stay there waiting for convoy an embargo was laid on all ships bound to *Leghorn*, one of the ports in the territories of the Grand Duke of *Tuscany* and then in the possession of the *French Republic*, by an order of his Majesty in council of the 27th *July* 1796; which embargo was directed to continue until further order of the Board of Privy Council. The ship was thereby prevented from then further proceeding upon her voyage.

By another order of his Majesty in council dated the 23d of *August* 1796 it was ordered that the embargo so laid on should be taken off, so far as to permit the ships and vessels ready to sail for any of the ports before described to proceed from the ports where they then were to the ports where they might have respectively taken their several cargoes on board; provided that the master of such ships or vessels first gave security &c, that the said ship should return to their respective ports of lading, under convoy of such of his

his Majesty's ships as should be appointed to convoy the same, and should proceed with such convoy and not desert the same on the voyage till their arrival at their respective ports of lading, or so long as such convoy should be instructed to protect the said ships; and it was thereby further ordered that the said ships upon their arrival at the ports where they respectively took in their several cargoes be permitted to reland the same, and deposit the goods in warehouses to be approved of by the proper officers of the revenue of customs and excise &c. at the expence of the proprietors, and that the proprietors be at liberty to take the same out of the said warehouses for exportation under the usual regulations if they should so think fit, or for home consumption upon repayment of the respective drawbacks if any should have been obtained on the said goods &c. On the 7th of *May* 1798 the plaintiff received notice from the defendants, that unless they would receive back the goods by them shipped on board the *Pomona*, pay the freight, and give up the bills of lading, or a bond of indemnity, with sufficient sureties against any damage which the owners or master of the *Pomona* might sustain by reason of the bills of lading not being delivered up, they would within twenty-one days cause the remainder of her cargo to be relanded, and the goods shipped to be warehoused on the account and at the risk of the person and persons to whom the same belonged. In *June* following he also received from them a further notice, which after referring to the order of Council of the 27th of *July* 1796 and the 23d of *August* 1796, concluded as follows; "We the owners of the brigantine *Pomona*, *James Dunn* master, now lying at the port of *Falmouth*, having concluded to act agreeably to the directions contained in the said recited order, (*i. e.* the last), do hereby give you notice that after the expiration of fourteen days from the date hereof we shall cause the said vessel and such part of her cargo as now remains on board to be brought to *Liverpool* and there reland and warehouse the same, agreeably to the directions of the said order, unless you shall choose to have them relanded at *Falmouth*, and shall without delay obtain a lawful authority for that purpose, and give notice to the master of the said vessel of such your intentions within a reasonable time after the service thereof; and we do further give you notice that the goods so laden as aforesaid will be brought to the port of *Liverpool* at the risk of the respective owners or proprietors thereof: but if the owners or proprietors shall think fit to cause the same to be insured for the

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saïd voyage to *Liverpool* aforesaid, such insurance shall and may be effected without prejudice to any legal or equitable question between us as owners of the saïd vessel and the owners or proprietors of the saïd goods respectively or any of them." The saïd ship remained at *Falmouth* until the middle of *August* 1798, during all which time the embargo continued; at which time she without the consent of the plaintiff set sail with his goods on board from *Falmouth* for *Liverpool*, under the protection of the order of Council of the 23d of *August* 1796, and complied with all the requisitions of such order; and shortly afterwards arrived at *Liverpool*. After the ship's return to *Liverpool* the plaintiff by agreement with the defendants received his goods back, but without prejudice to his right to recover in this action. On the 24th of *October* 1798, nearly two months after the ship's arrival at *Liverpool*, by an order of his Majesty in council the embargo laid on by the order of the 27th *July* 1796, as far as related to ships bound to *Leghorn*, was wholly taken off. The question for the opinion of the Court is, whether the plaintiff be entitled to recover in this action?

This case was argued in the last term by *Giles* for the plaintiff, and *Scarlett* for the defendants; and now by *Gibbs* for the plaintiff, and *Wood* for the defendants.

For the plaintiff it was insisted that the embargo did not discharge the defendants from the obligation of their contract to carry the goods to *Leghorn*. An embargo in it's nature is only temporary, and it was expressed in this instance to be only "*until the further order of Council.*" Therefore admitting it to be as imperative on the parties as an act of parliament, yet it is not like a general unlimited prohibition, making that unlawful which before was lawful, but at most operated as a *suspension* only, and not as a *dissolution*, of the contract; and when the suspension was taken off, the former liability of the defendants to perform their undertaking again attached upon them. Herewith agrees 1 *Valin. Comment.* 627. art. 8th. The consequences of deciding that an embargo dissolves a contract to carry goods would be very mischievous, for the same doctrine would extend to every other contract relative to the voyage; such as those between the owners and the mariners; and though the embargo were only to continue for a few days, the ships might in consequence be deserted by their crews. It is true that in a case like this hardships may arise to both parties from the long continuance of an embargo; but when it is considered that it must be known to them at the time of entering into the contract that an embargo may lawfully be laid in time of war,

they must be taken to have made their contract subject to the operation of the law in that respect. Then if the embargo did not dissolve the contract between the parties when it was first laid on, no continuance of it afterwards could have that effect. No line can be drawn to shew when it first began to have that operation. The case of *Draddy v. Deacon* (a) only shews that if the parties after an embargo laid abandon their first agreement and enter into or superadd another, they shall be bound by it. But here there was no consent of the plaintiff to abandon his original contract; and the defendants themselves considered it as in force at the end of two years after the embargo first laid, for they called on the plaintiff to pay freight to *Falmouth*. Both parties must either be equally bound or equally discharged: and if the defendants by their sole act could put an end to the contract at *Falmouth* and call on the plaintiff to take away his goods and pay his freight pro rata there, the plaintiff might equally have demanded his goods at the same place on the like terms: but the contrary was holden in *Luke v. Lyde* (b); and therefore the right now contended for by the defendants cannot be well founded.

For the defendants it was argued that this case falls within the general rule, that where a contract, which was possible and legal at the time of making it, becomes afterwards impossible by the act of God or illegal by an ordinance of the State, the obligation is discharged. 1 *Rol. Abr.* 451. title "Condition." *Williams v. Hide*, 2 *Palm.* 548. *W. Jones* 179. S. C.; *Dy.* 28. a. pl. 186.; *Brewster v. Kitchin* 1 *L. Ray.* 317. 321.; *Salk.* 198. S. C. *Beterworth v. Dean and Chapter of St. Paul's*, 2 *Eq. Cas. Abr.* 26 (c). The reason on which those cases are founded is that in every contract it is to be presumed that it was not in the contemplation of the parties to stipulate for impossible things. Now here the embargo, which it is admitted is as binding during its continuance as an act of parliament, rendering the performance of the contract illegal, absolved the defendants from their promises; and either party was at liberty at any time during the continuance of it to put an end to the contract; or it might be left as a question for the jury whether the party had waited a reasonable time after the embargo first laid, in which case two years would certainly

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be deemed a reasonable time. The embargo being for an unlimited time, the parties could not foresee how long it would remain in force; and from the nature of the occasion, namely, the possession of *Leghorn* by the enemy, it might have continued during the war or even longer: so that as to them it might be considered as a general prohibition to execute the contract; at least there was no probability of it's being taken off within a reasonable time. And in the construction of contracts to be executed in præsentia the Court will not look to possibilities comparatively remote. The hardship arising to either party is no argument in a court of law: but it is of less weight in this case, because each may insure against any loss on account of an embargo; or if by means of the embargo the voyage was lost the assured might abandon the goods to the underwriters. The case of *Draddy v. Deacon* (a) is in point. There the plaintiff had freighted the defendant's ship for a certain voyage at so much per ton; and pending the contract an embargo was laid on for six weeks; after which the ship sailed; and the defendant concealing his agreement from the plaintiff's agents abroad stipulated with them for the payment of a larger freight: The defendant having recovered at law upon that last agreement, the plaintiff filed his bill to be relieved on the ground of the fraud in concealing the first agreement: but the Court dismissed the bill, on the express ground that the embargo having obstructed the performance of the first agreement the defendant was at liberty to make a new one. Now such a decree could not have been made, unless the Court had been of opinion that the embargo had dissolved the original contract. And *Molloy* (b), citing that case, considers an embargo as having that operation. But if there be any doubt on that point, at any rate the contract was put an end to by the 33 *Geo. 3. c. 27. s. 3.*, which enacts that if any subject during the continuance of the war shall without license from his Majesty go to any place under the government of *France*, he shall be imprisoned. It therefore became illegal by virtue of this act to go to *Leghorn* while it was in the possession of the *French*, as it then was.

In reply it was observed that it never had been determined that a policy of insurance extends to indemnify the assured against a loss by means of an embargo laid in this country; and even if the assured could abandon by reason of the loss of the voyage, he

(a) 2 *Vern.* 242.

(b) *b. 2. ch. 2. s. 3.*

could

could only recover from the underwriters the value of the goods, which would be no indemnity for the loss of the market. Besides, no consideration of this sort can affect the construction of the contract between these parties. The defendants' argument is founded on a supposition that the embargo rendered the voyage illegal; whereas the only effect of it was to delay the performance of the voyage. The case in *Vernon* is quite unintelligible, and cannot be law to the extent to which it is attempted to be carried. The argument drawn from the statute 33 Geo. 3. is ad idem, because the act itself is as much of a temporary nature as the embargo; and in the present instance depended on the same circumstance.

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LORD KENYON Ch. J. Whenever a case comes before us that is likely to be attended with hardship to the parties, a struggle naturally arises in our minds to find out (if possible) some way of extricating all the parties from it. In the present case both parties are innocent; and whatever may be our decision, one party or the other must suffer. In such a situation we must explore our way as well as we can, but we must determine according to the principles of law. By the terms of this contract the defendants undertook to carry the plaintiff's goods from *Liverpool* to *Leghorn* for a certain price; the plaintiff now charges the defendants with not having fulfilled their agreement, and claims an indemnity for the loss which he has sustained by reason of the nonperformance of the contract on their part: in answer to this the defendants say that they are not answerable on account of the embargo that was imposed when the ship was lying at *Falmouth*; and in the course of the argument I expected that the defendants' counsel would have drawn the line, and would have shewn that though an embargo of a certain duration would not put an end to such a contract as the present, an embargo of some longer duration would. But no such line has been, or I believe can be, drawn. It is admitted that an embargo being imposed during the war was a legal interruption of the voyage: but it would be attended with the most mischievous consequences if a temporary embargo were to put an end to such a contract as this; because if it were to have that effect, it must also have the effect of putting an end to all contracts for freight and for wages. The difficulty in this case is to draw the line; the defendants contracted with the plaintiff to carry his goods to *Leghorn*; that

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contract was certainly obligatory at the time when it was made, and it must continue to be binding unless it has since been put an end to. Then at what time was it put an end to? was it put an end during the ship's stay at *Falmouth*, or immediately after she sailed for *Liverpool*? It would afford an argument against the defendants in this particular case that they kept the goods on board during all this time and thought they were bound by this contract. However I do not decide this case on that ground, but on the general ground that a temporary interruption of a voyage by an embargo does not put an end to such a contract as this. If this contract were put an end to, it might equally be said that interruptions to a voyage from other causes would also have put an end to it; *e. g.* a ship being driven out of her course; and yet that was never pretended. Instances of such interruptions frequently occur in voyages from the north-west parts of this kingdom to *Ireland*; sometimes ships are driven by the violence of the winds to the ports in *Denmark*, where they have been obliged to winter. The case that has been cited from *Vernon* furnishes us with no principle of decision; the report of it there is very unsatisfactory; and no trace of it is to be found in the Register's book. There being therefore no decision in favour of the defendants, and the plaintiff wishing to enforce his contract, I cannot feel myself justified by any principle of law to say that the contract was put an end to by this temporary embargo, but I am of opinion that, however hard or inconvenient it may be to the defendants, the plaintiff is entitled to recover.

GROSE J. This seems to be a case of peculiar hardship either on the one side or the other, and therefore we must determine it according to the strict rules of law. This contract was certainly binding on these parties at the time; and I agree with the defendants' counsel that the true meaning of it was, that the defendants were bound to convey the plaintiff's goods within a reasonable time. After the contract was made an embargo was imposed, which was only a temporary restraint and prevented the ship's performing her voyage at that time, but still the defendants were bound to comply with the terms of the contract as soon as they reasonably could: even if we consider the embargo to have the same effect as an act of parliament, still it would only create a temporary restraint, until such time as the King in council should take off the embargo. Such an act of parliament would not

dissolve, it would only suspend the execution of the contract; and the embargo cannot have a greater effect. If the embargo dissolved the contract, when did the dissolution take place? The mere stating of the question puts an end to all further inquiry; the defendant's counsel could not shew at what precise time the contract was dissolved. And if this contract were dissolved by the embargo, it would be followed by the very alarming consequence stated at the bar, that all the contracts between the owner and the mariners would also be put an end to. Here neither of the parties being in fault, the strict law must take place; the defendants have not done that which by their contract they were bound to perform, and therefore the plaintiff is entitled to recover the damages which he has sustained by reason of their nonperformance of the contract.

LAWRENCE J. This is certainly a case of hardship on the defendants; but I do not see any legal grounds on which they can be excused paying the damages which the plaintiff has suffered in consequence of their not having performed their engagement. The counsel for the defendants were driven to the necessity of introducing into this contract other terms than those which it contains; they contended that the defendants were only bound to fulfil their engagement within a reasonable time, and then argued that as the embargo prevented the completion of the contract within a reasonable time the defendants were absolved from their engagement altogether. But it was incumbent on the defendants, when they entered into this contract, to specify the terms and conditions on which they would engage to carry the plaintiff's goods to *Leghorn*: they accordingly did express the terms, and absolutely engaged to carry the goods "the dangers of the seas only excepted"; that therefore is the only excuse which they can make for not performing the contract; if they had intended that they should be excused for any other cause, they should have introduced such an exception into their contract. In *All. 27.* this distinction is taken; "Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him: but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract". So in this case there was one accident against which the defendants

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provided by their contract; they might also have provided against an embargo. But we cannot vary the terms of this contract, and the defendants must be bound by the terms of the contract that they have made.

Postea to the plaintiff.

Tuesday,
May 28th.

HAVELOCK *against* ROCKWOOD.

A sentence of condemnation of a British ship (which had been captured by a French privateer and carried into Bergen in Norway) by the French Consul at Bergen is an illegal sentence.

—If after such a sentence the owner repurchase his ship at a public auction at Bergen, he cannot recover the money so paid from the underwriter. —Such a contract is a ransom, and illegal.

THIS was an action on a policy of assurance upon the ship *Themis* of which the plaintiff was owner for twelve calendar months commencing on &c. and underwritten by the defendant for 15*l*. The declaration was in the usual form, and averred a total loss by capture within that period. The defendant pleaded the general issue, and paid 4*l*. 11*s*. 8*d*. into court upon the whole declaration, being after the rate of 30*l*. 11*s*. 3¼*d*. per cent. On the trial a verdict was found for the plaintiff, with 10*l*. 8*s*. 4*d*. damages, subject to the opinion of this Court on the following case.

On the 31st of *March* 1797 the ship was chartered to sail from *Shields* to *Riga* for a cargo of balk timber hemp and flax to be delivered at *Liverpool*. On the fourth of *April* she sailed from *Shields*, and early in the morning of the 7th was captured after an engagement, in which she suffered considerable damage by a French privateer, and was carried into the port of *Bergen* in *Norway*, and on the 17th of *April* was condemned by a sentence of condemnation by the French Consul at *Bergen*. The first intelligence of the capture was brought to *England* by the master, who was immediately sent by the plaintiff to *Shields* to communicate it to the broker and agent for the underwriters and demand payment of the insurance as for a total loss, which he did. The broker dispensed with the master's making a protest, and said the business could not be taken into consideration until the second meeting of the committee of the underwriters on this policy. Afterwards on the fifth of *June* the plaintiff received a letter from the broker, in which it was stated that the insurers were ready to settle with him, he first making an assignment of a fourth part to the broker for the benefit of the underwriters; and it was also stated that if the plaintiff had any thoughts of repurchasing the ship the committee would have no objection to pay their quota of the price. The sum assured

assured did not amount to one fourth of the value of the ship, and the plaintiff declined making the assignment. Instances of this sort of condemnation in the port of *Bergen* have been frequent during this war, and they are made with the knowledge of the *Danish* government, who receive duties on such condemnation and the sales in consequence of them, and who did so upon the present occasion. On the 30th of *July* 1798 the ship in question was put up to public auction at *Bergen* by the public officer appointed by the Court of *Denmark* for sales by auction, having been previously advertised as well by posting up bills in the public places of the city as by advertisement in the *Bergen Gazette*, and was purchased by the *British* Vice-Consul resident there as agent for the plaintiff, for the sum of 1628*l.* 8*s.* 4*d.* The sale was a fair one, and there were many bidders besides the plaintiff's agent. The ship did not proceed upon the voyage to *Riga* and from thence to *Liverpool*, but after the purchase and being repaired she sailed on the 15th of *August* to *Petersburg*, and is since returned to *England* and is now in the possession of the plaintiff. The questions for the opinion of the Court are, 1st, Whether the plaintiff is entitled to recover for a total or only for an average loss? 2dly, If for an average loss only, whether the sum paid for the purchase is or is not to be included? If the Court shall be of opinion that the plaintiff is entitled to recover for a total loss, the present verdict is to stand; if for an average loss only and the sum paid for the purchase is to be included, the damage is to be reduced to ; if for an average loss only, and the sum paid for the purchase is not to be included, a nonsuit is to be entered.

This case was argued in *Easter* term last by *Gaselee* for the plaintiff and *Park* for the defendant, and now by *Holroyd* for the former and *Gibbs* for the latter.

Arguments for the plaintiff. First; The plaintiff is entitled to recover as for a total loss, either on the ground that after the ship was captured by an enemy she was condemned by a Court of competent jurisdiction, or on the ground that when she was captured the plaintiff had a right to, and did in fact, abandon to the underwriter. Secondly, At all events the plaintiff is entitled to recover as for an average loss, in which is to be included the sum paid for the repurchase of the ship. First. [The former part of the first ground was abandoned in the course of the argument as untenable,

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the Court expressing a decided opinion that no *French* Court of Admiralty could legally be holden in *Denmark*, and recognizing and adopting a late decision in our Court of Admiralty (a) respecting the ship *Flad Oyen*.] But independently of any condemnation there

(a) That was the case of an *English* ship captured by the *French*, carried into *Bergen*, there condemned by the *French* Consul, and purchased there by *Hans Krohn* a *Danish* subject. The opinion of the Court of Admiralty here was delivered on the 16th of *January* last, by Sir *W. Scott*; "This is the case of a ship, which was taken by a *French* privateer and carried into the port of *Bergen* in *Norway*, where it appears she underwent a sort of process which terminated in a sentence of condemnation pronounced by the *French* Consul, and under that sentence she was transferred to the present neutral proprietor as he is described. The sale was conducted by public auction, but it appears that the very person who was the purchaser was likewise the seller and also acted in the capacity of general agent at this place for the *French* nation. The ship was put up to auction, and there was no other bidder whatever, and she was purchased by himself and purchased under the denomination of *agent*. Now from the ambiguity stated, the presumption on the case of such a sale would be, that he purchased her in the same character in which he had sold her; having sold her as agent, he might be considered as having bought her in for the *French* proprietors who had carried her into that port. The utmost that the Court would do in such a case would be to allow further proof in order to see how he bought her, whether as *agent* or not. It appears that this ship was sent immediately to *France*, which of itself colours the nature of the purchase, and shews it was not for a *Dane* but on behalf of persons who were resident in *France*. It appears likewise that he sent this vessel with papers for the island of *Saint Martin's* when in fact she had private directions to get into the port of *Havre* if she possibly could. Now from the depositions I think it was entirely within the knowledge of the pretended purchaser that *Havre* was a blockaded port: he orders her to get into *Havre de Grace* and land the goods, if it be possible, but in case she was prevented from so doing she was then to go to *Saint Martin's* and land the goods there. I think it sufficiently appears under these circumstances

that the vigilance of *British* cruisers was if possible to be avoided, and that here has been a fraudulent intention to break the blockade which at that time was actually existing.

All the papers on board differ from the actual proof, because they represent *Saint Martin's* as the primary port of destination, whereas it was in fact to be the dernier resort in case she could not effect this attempt of getting into *Havre*. Under these circumstances I am of opinion that this does amount to that fraudulent conduct on the part of this purchaser which would debar him from the advantage of further proof, and taking all the circumstances together I am of opinion that it was no actual transfer, but that the ship remained the property of the *French* captors, and that she was going to *France* to be put into their possession, he having made this purchase in *Denmark* and protected it by the colourable use of his own neutral name, and therefore upon that part of the case I shall have very little doubt in pronouncing a sentence of condemnation.

But another question has arisen in this case, upon which a great deal of argument has been employed, namely, whether the sentence of condemnation which was pronounced by the *French* Consul is of such legal authority as that it would transfer the vessel, supposing the purchase had been bona fide made. I directed the counsel for the claimants to begin, because the sentence being of a species altogether new it lay upon them to prove that it was nevertheless a legal one. It has frequently been said, that it is the peculiar doctrine of the law of *England* to require a sentence of condemnation as necessary to transfer the property, and that according to the practice of some nations twenty-four hours and according to the practice of others the bringing *infra presidia* is authority enough to convert the prize. I take that to be not quite correct; for I apprehend that by the general practice of the law of nations, a sentence of condemnation is at present deemed generally necessary, and that a neutral purchaser in *Europe* during war does look to the legal sentence of condemnation

there is enough found in this case to entitle the plaintiff to recover for a total loss, giving the underwriter the benefit of his situation.

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demnation as one of the title-deeds of the ship, if he buy a prize-vessel. I believe there is no instance in which a man, having purchased a prize-vessel of a belligerent, has thought himself quite secure in making that purchase, merely because the ship had been in their possession twenty-four hours, or carried *infra presidia*; the contrary has been more generally holden, and it is amongst those documents which are most universally produced by a neutral purchaser, that if she has been taken as a prize it should appear that that prize has been in the proper judicial form subjected to adjudication. Now in what form have those adjudications constantly appeared? They are the sentences of courts acting and exercising functions in the belligerent country, and it is for the very first time in the world that in the year 1799 an attempt is made to impose upon the court a sentence of a tribunal not existing in the belligerent country but of a person pretending to be authorised within the dominions of a neutral country. In my opinion, if it could even be shewn that, regarding mere speculative general principles, such a condemnation ought to be deemed sufficient, that would not be enough. More must be proved; it must be shewn that it is conformable to the usage and the practice of nations. A great part of the law of nations stands on no other foundation. It is introduced indeed by general principles, but it travels along with those general principles only to a certain extent: and if it stop there, you are not at liberty to go farther and to say that more general speculations would bear you out in a further progress.—Thus, for instance, on mere general principles it is lawful to destroy your enemy, and mere general principles make no great difference as to the manner by which this is to be effected, but the conventional law of mankind, which is evidenced in their practice, does make a distinction and allows some and prohibits other modes of destruction. And a belligerent is bound to confine himself to those modes which the common practice of mankind has employed, and to relinquish those which the same practice has not brought within the ordinary exercise of war, however sanctioned by its principles. The practice of nations is to be

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collected from approved writers on the laws of nations: and no one country has a right to innovate in these matters by its own authority. Now it having been the constant usage that the tribunals of the law of nations in these matters shall exercise their functions within the belligerent country, if it were proved to me in the clearest manner, that on mere general theory such a tribunal might act in a neutral country, I must take my stand on the ancient and universal practice of mankind, and say that as far as that practice has gone I am willing to go, and where it has thought proper to stop, there I must stop likewise. It is my duty not to admit that, because one nation has thought proper to depart from the common usage of the world, I am on that account under the necessity of acknowledging the efficacy of such a novel institution, merely because general theory might give it a degree of countenance. The institution must conform to the text law and likewise to the constant usage in these matters; and when I am told that before the present war no sentence of this kind has ever been produced in the annals of mankind, and that it is produced by one nation only in this war, I require nothing more to satisfy me that it is the duty of this Court to reject such a sentence as inadmissible.

Having thus declared that there must be an antecedent usage upon the subject, I should think myself justified in dismissing this matter without entering further into it. But even if we looked farther, I see no sufficient ground to say that on mere general principles such a sentence could be sustained. Proceedings upon prize are proceedings in rem; and very few deviations have taken place from the rule that the *res* should be in the ports of the belligerent nation, and much more ought the court adjudging prize-causes to be there. Much stress has been laid on some cases of condemnations of *British* prizes carried into the ports of *Lisbon* and *Leghorn*, those condemnations being pronounced by the High Court of Admiralty in *England*. This is a kind of argument *ad hominem*, to shew that we ourselves have attempted to reach property

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Goss v. Withers, 2 Burr. 694. Here a total loss did happen at one time by the capture of the ship: and though the plaintiff did not

not within our jurisdiction. But those cases are so few in number, and are so contrary to the principles acted upon in other cases, that they may be considered as mere irregularities. It is then contended that such irregularities will justify others on the part of other nations. This I deny. The true mode of correcting the irregular practice of nations is by protesting against it, and inducing that country to reform it. It is monstrous to suppose that, because one country has been guilty of an irregularity, every other country is to let loose the law of nations. Upon these ports of *Lisbon* and *Leghorn* it is to be remarked that they have a peculiar and discriminate character, a character that to a certain degree assimilates them to *British* ports. The *British* exist there in a distinct character under the protection of peculiar treaties; and with respect to *Portugal*, those treaties go so far as to engage that if a ship belonging to one country shall be brought by its enemy into the ports of the other which happens to be at peace, this neutral country shall be bound to seize that ship and restore it to its ally. To be sure, no covenant can have more the effect of giving the ports of *England* and *Portugal* a reciprocal relation of a very peculiar sort, to make the *British* ports *Portuguese* ports, and the *Portuguese* ports *British* ports to a certain degree. Now unless I am given to understand that peculiar treaties between *France* and *Denmark* have impressed such a distinctive character upon the port of *Bergen*, I cannot allow that it can be considered, on the mere footing of general neutrality, to be a *French* port, exactly in the same manner in which *London* may be considered as a *Portuguese* port, or *Lisbon* a *British* port. But supposing this possible, still it would not follow that such condemnations could be pleaded as authorities in the present case; because in the first place the validity of such condemnations themselves may be the subject of reasonable doubt, for it by no means appears that the enemies or neutrals who have an interest in contesting them have ever acknowledged their validity.

Whoever purchases under such sentences must be content to purchase them subject to all the questions that may arise upon their sufficiency. But secondly, supposing that no doubts could be entertained respecting the sufficiency of such sentences, it by no means follows that the efficacy of the present sentence can be supported. In those instances the tribunal was acting in the country to which it belongs, and with whose authority it is armed. Here a person utterly destitute of all authority, except over the subjects of his own country, and possessing that merely by the indulgence of the country in which he resides, pretends to exercise a jurisdiction in a matter in which the subjects of many other states may be concerned. No such authority was ever conceded by a country to a foreign agent of any description residing within it; and least of all could such an authority be conceded in the matter of prize; a matter over which a neutral country has no cognizance whatever, except in the single case of an infringement of its own territory. Consider the consequences which must follow from allowing the validity of this condemnation; it would have the effect of making every port of every neutral nation a port of condemnation. This must give a reasonable jealousy to belligerent powers, and would serve at length to embroil every neutral nation. If *France* can station a judge of the Admiralty at *Bergen*, and can station there its cruizers to carry in prizes for that judge to condemn, who can deny that to every purpose of hostile mischief against the commerce of *England* *Bergen* will become an enemy's port? *Bergen* will differ from *Dunkirk* in no other respect but this, that it is a port of the enemy to a much greater extent of practical mischief. To make the ports of *Norway* the seats of the *French* tribunals of war is to make the adjacent sea the theatre of *French* hostility. It gives one belligerent the unfair advantage of a new station of war, which does not properly belong to him, and it gives to the other the

not give formal notice of abandonment to the underwriter, he did that which was equivalent, he gave notice of the capture to the defendant's agent demanding payment of the insurance as for a total loss. It is not necessary that the assured should declare in express terms that he abandons to the underwriter; it is sufficient that he does an act shewing that he means to abandon. Secondly; In calculating what is to be paid as for an average loss the sum, paid for the purchase of the ship is to be included. To this it will be objected that the purchase was illegal, it being in contravention of the ransom acts; 2 *Geo. 3. c. 25*, and 35 *Geo. 3. c. 66. s. 37, 38, 39*. But it will be found, on examining those statutes, that this case does not fall within either of them. This was not a ransom, but the purchase, of a ship. A ransom is a contract between the captor and the captured at sea, by which the ship is protected on her voyage from any subsequent capture by the same enemy, and for which, as appears by the preamble to the stat. 22 *Geo. 3. c. 25.*, hostages and a ransom bill are given to bind the owners notwithstanding a subsequent recapture during the same voyage:

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the unfair disadvantage of one active enemy in a quarter where no enemy would naturally be found. The coast of *Norway* could no longer be approached by the *British* merchant with safety, and a suspension of commerce would be followed by a suspension of amity. Wisely therefore did the *American* government defeat a similar attempt made at an earlier period of this war. They know that to permit such an exercise of the right of war within their cities would be to make their coasts the stations of hostility. Whether the government of *Denmark* has shewn equal vigilance in observing or equal indignation in repelling the attempt is more than I am warranted to assert. But though the publicity of the transaction in the town of *Bergen* may subject the public of that place to some degree of observation, I see nothing in the papers which issue immediately from the royal authority that at all affects the government itself with the knowledge and approbation of the facts; and indeed it would be indecent to suppose that a country standing upon the footing of ancient and friendly alliance to this country

could have given it's sanction to a measure so full of hostility to it's friend and of possible inconvenience to itself. I must therefore deem the act of this *French* Consul a licentious attempt to exercise the rights of war within the bosom of a neutral country, where no such exercise has ever been authorised.

I am of opinion upon the whole that this ship must be restored to the *British* owners upon the usual salvage, and I dismiss the claim of Mr. *Krohn* upon both grounds, as well upon the illegality of the sentence as upon the want of reality in the pretended transfer from the *French* captors. And I must add that, Mr. *Krohn* appearing to possess two characters, that of *Danish* subject and *French* agent, the claim which he has brought forwards favours much more of the latter character than of the former. It is beyond my belief that any man standing in the genuine and unmixed character of a *Danish* subject should entertain a wish to establish that sort of law, for which this *French* agent has thought proper to contend."

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but here no such contract took place; no hostages were given, there was no contract at sea, but the sale took place on land at a public auction holden under the authority of a neutral power. The counsel relied on the case of *Berens v. Rucker*, 1 *Bl. Rep.* 313. to shew that the owners may recover from the underwriters the charge of a compromise paid to regain the possession of a ship unjustly condemned as prize. They also cited the case of *M^r Masters v. Shoolbred* (a); where the ship having been captured by a *French* frigate, carried into *Charles-Town* in *America*, sold there by the authority of the *French* Consul, and purchased by the captain on account of the owners, the owners were permitted to recover against the assured the price paid for the repurchase of the ship. But whatever construction may be put on those acts of parliament, the defendant ought not to be permitted to take advantage of this objection, because he himself suggested the wish to repurchase the ship.

Arguments for the defendant. First; Whatever right the assured may have had to abandon at one time, he cannot now recover as for a total loss, because he ought to have made his election to abandon immediately after the capture; but he refused to transfer his right to the underwriter, and therefore he cannot now say that he was ready to abandon. For though it is stated that notice of the loss was given and a demand made of the insurance money, it is also stated that he refused to make an assignment of his interest for the benefit of the underwriter. [This answer was in the course of the argument adopted by the Court, who said that the plaintiff could not be considered as having abandoned to the underwriters, he having expressly refused to assign over his interest to them.] Secondly; Then if this be only an average loss, the defendant is not bound to include in that the price paid for the repurchase of the ship, that being a void contract not only by the two acts of parliament alluded to but also by the common law. Those statutes are remedial laws, and ought therefore to receive a liberal interpretation. The first point relative to the sentence of condemnation being abandoned, it must now be taken that the property of the plaintiff never was altered, (because it could only be altered by a legal sentence of condemnation,) and consequently that the ship remained the legal property of the assured. Then in that situation a sum of money was paid by the agent of the assured to the captor

(a) At the Guildhall Sittings after *M.* 35 *Geo.* 3. cor. Lord *Kenyon*. *Esplan.* N. P. 237.

for the restoration of his own ship. For though it is not stated that the price was paid directly to the captors, the object of the pretended sale was that the produce should go to them. It is said however that this was a sale of the ship to the plaintiff and not a ransom: but on considering what is a sale in opposition to a ransom, it will be found that the transaction at *Bergen* answers the definition of a ransom. A sale is a contract between two parties where the vendor has not only the possession but the property and by which the purchaser acquires both the possession and the property. A ransom is a sum of money paid by the owner of a thing taken by an enemy to regain the possession before the enemy has acquired a legal property in it by a sentence of condemnation. Here tho' the captors had the possession, they had no property in the ship; and the assured acquired no property in it by this transaction, they merely retained the possession, and then they were in of their former title. The statutes alluded to do not speak of ransoms at sea: it is equally a ransom though the contract be made on land, otherwise the statutes might be evaded by sending the ship taken to some port for the very purpose of ransoming her. And this contract is attended with the same mischievous consequences that ensue from a ransom at sea; for if this be permitted, it prevents the chance of a recapture before the ship can be carried into an enemy's port, in which case the assured would have had the benefit of the recapture on paying the salvage. The case of *M' Masters v. Schoolbred* cannot be considered as any authority against the defendants, because this question was not there considered. But whether or not this be a ransom within the acts of parliament, at all events this was an illegal contract on the ground of its being a trading with the enemy; and the money paid on such a contract cannot be the subject of an action. [The argument on this point is here omitted, because the Court expressly declined giving any opinion upon it (a)].

Arguments in reply. This contract cannot be considered as a ransom, because there was no treaty between the captors and the captured; it was a contract of sale made at a public auction, at which were many bidders, and where any other person as well as the plaintiff might have become the purchaser. Whereas in the case of a ransom, it can only be a contract between the captors and captured; there the captors release their right of capture; but here they insisted on the right and disposed of the ship as their

(a) Vid. *Bell v. Gilson, Bos. & Pull.* 345.

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own. These acts of parliament creating penalties and forfeitures are highly penal, and must therefore in their construction be confined to those cases described in them; and this is not one of them. Still less reason is there for contending that this contract was void at common law; for if so, it was useless for the Legislature to make the two statutes that have been referred to. The assured therefore have a right to include in the average loss the price paid for the purchase of the ship. In case of a recapture, the salvage must have been paid by the underwriter. So here, the money paid for the purchase, even if the plaintiff were not in strictness bound to pay, yet having paid it, must be repaid by the underwriter. *Berens v. Rucker*, 1 *Bl. Rep.* 313. The owner has either lost his ship or his money, and in either case he has a right to call on the underwriter for an indemnity.

Lord KENYON Ch. J. As it is not necessary, for the decision of this case, to enter into a discussion of the last point made at the bar, namely, whether or not the contract made at *Bergen* were void on the ground of it's being a trading with the enemy, I shall decline giving any opinion on it, and the rather as this very question will arise in another case that is removed here from the Court of Common Pleas by a writ of error. Nor need I say much on the first point, respecting the sentence of the supposed Court at *Bergen*, a question that affects all commercial States, because that point has so lately been solemnly decided by Sir *W. Scott*, who determined it on grounds that will recommend the decision to all those who fill judicial situations. And I can only add that I most perfectly concur in the opinion there given. This delivers us from one of the most important points in the case. Therefore the question relative to the ransom is the only one that remains for our consideration. It is (I believe) a new question, for it was not made in the case of *M' Masters v. Schoolbred*. I cannot distinguish this case, in point of expedience, from those that are technically called a ransom: it is not necessary that a hostage should be put on board. The word "ransom" is synonymous with "redeem". Now here before the ship was carried into any port where she could be condemned, and before any suit for condemnation was instituted, the captor entered into a contract with the owner, and in consideration of a sum of money permitted him to have his ship again. And it is immaterial whether or not the pretended sale took place by the intervention of an agent; that was done in substance which the Legislature wished to prevent being done at all. I think
 it

it an important observation, made by the defendant's counsel, that in order to procure a legal sentence of condemnation in an enemy's port the ship must have traversed the high sea where there was a chance of a recapture by our own cruisers; in which case the owner might have had his ship again on paying salvage. These ransom acts must be considered as remedial laws; and in the construction of such acts, it is the rule to extend the remedy so as to meet the mischief; and I think that the Legislature intended, in passing these acts, to prevent such a transaction as the present taking place, because it would take away the chance of a recapture. I am therefore of opinion, though I had some doubt at first on this point, that this was a ransom, that the money paid by the plaintiff to regain the possession of his ship was illegally paid, and consequently that it cannot constitute a charge on the underwriter.

GROSE J. Though several questions have been discussed at the bar, only one remains for our consideration; for with regard to that respecting the sentence of condemnation, I am clearly of opinion for the reasons given by Sir *W. Scott* in the case cited that it cannot be considered as a legal sentence. Therefore the only remaining question is whether the price paid by the plaintiff for the purchase of the ship can be included in the average loss, which depends on this, whether or not that transaction were a ransom. When this case was argued before, it struck me that the ransom prohibited in the two acts of parliament was a ransom *at sea*: but on looking into the statutes I observe that the words "at sea" are not there used; and I think that a ransom is only a redemption for money or other consideration of that which is taken in war. This definition of it may be collected from the different interpretations that are given of that word in the dictionaries. Then what is this case; the plaintiff's ship, after being captured by the enemy, but before she was condemned as prize, was put up to auction and sold to the plaintiff, or at least delivered to him, for which he paid a sum of money. Then it was redeemed by him; there could not be any sale of the ship, because there was no sentence of condemnation, without which no property could be transferred to a purchaser. When therefore the ship, which before belonged to the plaintiff, was given to him again in consideration of a sum of money, it was a redemption, or ransom, of his ship. The circumstances of this transaction taking place on land and by means of an auction are immaterial; the place where a contract is made cannot vary the nature of the contract; and if this could be done
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by an auction it would be allowing a easy mode of evading the provisions of these salutary acts of parliament. Therefore it seems to me that this was in effect a ransom, and the sum paid by the plaintiff cannot be included in the average loss.

LAWRENCE J. This case having been already so fully discussed, little remains for me to add. The only point now for our consideration is whether this were or were not a ransom. It was either a sale, or a ransom, of the ship: but it could not be a sale, because there was no property in the captor for want of a sentence of condemnation; and the captured is in possession under his former title. There is no doubt but that, if the plaintiff had given the money, or a security for it, on the high seas in order to regain the possession of his ship, it would have been a ransom though no hostage were delivered or ransom-bill given; and it makes no difference that this contract took place on land, because the captor had no more right of property in the ship when in port than he had before when the ship was on the high seas. The acts of parliament not having described at what places or in what form a ransom is prohibited, but having prohibited ransoms in general terms, I think that this case comes within the mischief against which those statutes are meant to guard.

Per Curiam,

Judgment of nonsuit to be entered.

Friday,
May 31st.

HODGSON, Executor of HODGSON, the surviving
Executor of WATSON, *against* The EAST INDIA
COMPANY.

In an action of covenant for quiet enjoyment, the plaintiff may state generally that *A. B.* lawfully claiming title under the defendant entered by virtue of such title on the plaintiff, without setting forth the particulars of *A. B.*'s title.

THIS was an action of covenant. The declaration stated that by indenture, dated the 27th of *November* 1776, the defendants demised certain lands in *Bengal* to *Watson* from the 25th of *December* then last for 1000 years, provided the right and interest of the defendants to the same or any future right and interest therein to be by them acquired should so long exist, at the yearly rent of 100 *Sicca* rupees; in which indenture was a covenant by the defendants for quiet enjoyment without any let hindrance interruption or disturbance of or by the said United Company or

—Non infregit conventionem cannot be pleaded where the plaintiff assigns a breach (as above) adding, "and so the defendant did not keep his covenant &c."

any other person lawfully claiming or to claim by from or under them." The declaration then assigned several breaches, in one of which it was stated, that one *W. Tolley* "lawfully claiming a certain part of the said premises &c. by virtue of a certain right and title thereto to him theretofore made and derived by from and under the said United Company entered by such claim on the said last-mentioned part, and became and was possessed thereof, and continued so possessed thereof by virtue of his said right and title" &c. In another (the seventh) breach it was alleged that "one *Gocoul Gofawl* and divers other persons respectively lawfully claiming certain parts of the said premises &c. by virtue of certain rights and titles thereto to them respectively made and derived by from and under the said United Company lawfully entered into &c. and expelled" &c.

The defendants pleaded (besides several pleas on which issue was taken) two other pleas, to which the plaintiff demurred. The first was generally that they did not break their covenants in the said declaration specified &c. The other, which was pleaded to the seventh breach, (after protesting that *Gocoul Gofawl* and the said other persons did not respectively enter &c. by virtue of any rights or titles thereto to them respectively made or derived before the making of the said indenture by from or under the said United Company or by due course of law expel or eject *Watson* &c.) was, that before and at the time of the making of the said indenture (to wit) on the 27th of *November* 1776 to wit at &c. *Watson* had notice of the said respective claims rights and titles of the said *Gocoul Gofawl* and the said divers other persons in the said seventh breach mentioned in and to the certain parts in that breach mentioned of the said demised premises to them theretofore respectively demised and made by and under the said United Company, and it was then and there fully understood and agreed by and between *Watson* and the United Company that he (*Watson*) his executors &c. should at his own expence after the making of the said indenture procure and purchase of and from *Gocoul Gofawl* and the said divers other persons &c. for a just and sufficient compensation to be therefore paid to them respectively their several and respective rights and titles in and to the said certain parts of the said demised premises &c; and because *Watson* neglected and refused to procure and purchase of and from the said *Gocoul Gofawl* and the said other persons their said several and respective rights and titles in and to the said parts &c. according to such understanding and agreement

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between *Watson* and the Company as aforesaid *Gocoul Gosawl* and the said other persons by virtue of the said rights and titles which *Watson* had so agreed to purchase and procure and not under or by virtue of any other claim right or title whatsoever lawfully entered into and upon the said last-mentioned parts &c. and into and upon the possession of *Watson* &c. and by due course of law ejected him out of the possession thereof, and lawfully kept and continued *Watson* and his executors from and out of the possession thereof &c.

In the demurrer to the first of these pleas the following causes were assigned; that the plea is too large and general, and attempts to put into one issue all the several matters alleged by the plaintiff in the several breaches of covenant; and that the plea is a negative pleaded by way of answer to a negative, and attempts to make an issue out of two negatives, inasmuch as the plaintiff has alleged that the defendants had not kept their covenants and the defendants by way of answer to that allegation have pleaded that they had not broken the same &c. The causes of demurrer to the other plea were that it is not alleged nor does it appear by the plea that the said supposed understanding and agreement in that plea mentioned was under seal or capable in law of controlling the operation of the said indenture or of the said covenants &c.; and that the plea is too loose and general, and does not set forth with sufficient certainty the said supposed understanding and agreement &c.

Giles in support of the demurrer. The first plea demurred to is bad for the reasons assigned as causes of demurrer. In the first place, it is too general; several breaches were assigned in the declaration, and the plea attempts to put them all in issue. *Pitt v. Russell*, 3 *Lev.* 19. In the next place, the declaration being in the negative, that the defendants had not kept their covenants, it was not competent to the defendants to answer by another negative, that they had not broken their covenants; for two negatives cannot make an issue. *Pitt v. Russell*, *ib.*; *Boone v. Eyre*, 2 *Bl. Rep.* 1312; and *Walsingham v. Combe*, 1 *Lev.* 183; though in this latter case the Court said that the informality was cured by the verdict for the plaintiff. The other plea demurred to is also bad, because it attempts to set up a parol agreement in opposition to a deed. In *Goodwin v. Crowle*, *Cowp.* 358. where an action of debt was brought for a penalty for the nonperformance of articles of agreement, in which the plaintiff assigned a breach, the defendant pleaded

pleaded another agreement between him and the plaintiff, and yet the Court gave judgment for the plaintiff; and the propriety of the judgment in that respect was not questioned on a writ of error, which was brought upon other grounds. In *Blake's case* 6 Co. 43. b., where the defendant to an action of covenant pleaded an accord between him and the plaintiff, it was holden that as the action of covenant was founded on the deed it could not be discharged but by matter of as high a nature, and not by any accord or matter in pais. So in *Preston v. Christmas*, 2 Wils. 86. it was holden that satisfaction without deed could not be pleaded to debt on bond. So in *Rogers v. Payne*, 2 Wils. 376. it was ruled that a discharge without deed could not be pleaded to an action of covenant. Again, in *Little v. Holland*, ante, 3 vol. 590. it was decided that the plaintiff, who had covenanted to build two houses before a given day, and who averred that they were built by that time, could not support his action by proving that the time for building them had been enlarged by a subsequent agreement, and that he had built them before the expiration of such enlarged time.

Wood contra. First, This case is distinguishable from those cited. It may be admitted that where a party covenants to do certain things and an action is brought against him for nonperformance, he cannot plead non infregit conventionem, because that would be pleading one negative to another negative; and the cases cited by the plaintiff are of that description. That of *Pitt v. Russell* was for not repairing according to a covenant; and that of *Boone v. Eyre* was for nonpayment of an annuity. In such a case the defendant ought to shew that he had performed the things which he had covenanted to perform: but in such an action as the present, which alleges that the defendants had broken their covenant because the plaintiff was evicted by a third person, it is competent to the defendant to plead non infregit conventionem. The difficulty in this case arises from the plaintiff's mode of pleading; he should have concluded "and so the defendants have broken their covenant"; *After v. Mazzen*, 2 Mod. 311.; and then the denial by the defendants "that they had not broken their covenant" would have been a direct answer. Nor is there any objection to this plea on account of its generality; at least it is convenient to plead, in this manner, because it puts the whole in issue. But if the pleas cannot be supported, the defendants may

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now object to the declaration, and it appears that none of the breaches are there well assigned. In assigning breaches on this covenant, it is not sufficient for the plaintiff to allege generally "that *W. Tolley* lawfully claiming &c. by virtue of a right and title derived under the defendants entered" &c.; he should have shewn what that right and title was; so in the other breach, respecting the eviction by *Gocoul Gosawl*. In *White v. Ewer*, *Cro. Eliz.* 823., where the covenant was that the lessee and his assigns should enjoy without the interruption of *F. Ewer* and all others claiming under him, and the breach assigned was that he was ousted by *J. S.* who claimed under the title of *F. Ewer* without shewing how he claimed, it was holden that the breach was ill assigned. It is no answer to such an objection to say that *J. S.* was a stranger and that therefore the plaintiff could not shew his title; for that answer was there relied upon in this court, who gave judgment for the plaintiff; but their judgment was afterwards "reversed upon this exception by the opinion of all the justices and barons in the Exchequer-Chamber." On this ground therefore none of the breaches in the declaration are well assigned. As to the demurrer to the other plea; if the objection there assigned as cause of demurrer be well founded, the same objection equally applies to all the breaches in the declaration, for it is not stated in either of them that *W. Tolley* or *Gocoul Gosawl* entered by virtue of any title conferred upon them by the defendants *by deed*; and a corporation cannot part with their interest without deed.

Giles in reply. First, The principal objection to the first breach is that it comprehends all the breaches assigned, it even puts in issue the execution of the deed. [*Wood*. In *Gilbert v. Martin*, 1 *Lev.* 114., action of covenant for not repairing, it was holden that non infregit conventionem admitted the deed, and only put the non-repair in issue, and not the execution of the deed. [*Lawrence* Justice; Lord Chief Baron *Gilbert*; *Hist. of C. B.* 155., speaking of the plea of non infregit conventionem, says, "The defendant ought to traverse either the deed, or the breach, and both cannot be involved in non infregit conventionem, because the gift of the action lies on the deed which must be traversed by itself."] As to the objection to the declaration: if there be any foundation for the objection, it should have been shewn as special cause of demurrer, and cannot be taken advantage of in

this stage of the proceeding. But in truth the objection is not well founded; for in *Foster v. Pierſon*, ante 4 Vol. 617., in which the former caſes were conſidered, it was decided that in ſuch a caſe as the preſent it is ſufficient to allege that a third perſon “ had lawful right and title &c, and having ſuch lawful right and title entered &c, and evicted the plaintiff,” without ſhewing what title ſuch third perſon had. And it would be highly inconvenient if the law were otherwiſe; for the plaintiff has no means of knowing the particulars of the title of a ſtranger. It is the common rule in pleading, not confined to this particular caſe, that it is not neceſſary to ſet forth a ſtranger’s title in pleading; in actions againſt the aſſignee of a leſſee it is ſufficient to allege generally that the premiſes came to the defendant by aſſignment.

The Court took time to conſider of this caſe; and on a ſubſequent day in the term

LORD KENYON Ch. J. delivered the opinion of the Court, ſhortly, thus. We are of opinion that the firſt plea demurred to cannot be ſupported. It is only argumentative, and therefore an improper plea. As to the objection to the declaration, reſpecting which the caſe cited from *Cro. Eliz.* 823. raiſed ſome doubt in our minds at the time; we have ſince the argument looked into the caſe of *Foster v. Pierſon*, which was relied upon as an authority in ſupport of this declaration, and in which all the former caſes were conſidered, and we are of opinion that the breaches here are properly aſſigned. If they were not, it would impoſe inſuperable difficulties on the plaintiff; for I do not know how it was poſſible for him to ſet forth the particulars of the titles of the perſons who entered upon him; ſuch knowledge could only be acquired by an inſpection of title deeds to which he could have no acceſs. Therefore on the authority of that caſe, and on the expedience of the thing, we think that the plaintiff is entitled to judgment.

Judgment for the plaintiff.



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Friday,
May 31st.MUNRO *against* SPINKS.

In an affidavit to hold to bail made by the plaintiff's agent, (the plaintiff himself being abroad) it is sufficient to negative a tender of the debt in bank notes "as the agent believes."

IN debt on a foreign judgment, the affidavit to hold to bail was made by the plaintiff's agent in *England*, (the plaintiff himself being abroad) who swore positively to the debt, adding that no offer had been made to pay the same in bank notes &c (according to the statute 37 *Geo. 3. c. 45.*) *as he believed*.

It was objected on the part of the defendant that the affidavit was defective, it not containing a positive denial of the offer to pay the debt in bank notes.

To this it was answered that as this affidavit was made (not by the plaintiff himself, but) by a third person, it was sufficient to negative this tender of bank notes to the best of the belief of the person swearing, since he could not take upon himself to swear positively to such a fact; that an affidavit of the debt itself by an executor, or by the assignees of a bankrupt, "according to their belief," is allowed to be sufficient; and that in this instance there was a positive affidavit of the debt.

The Court, thinking this answer sufficient, discharged the rule for ordering the bail bond to be delivered up to be cancelled.

Kidd in support of the rule.

Garrow and *Walton* contra.

Saturday,
June 1st.The KING *against* JOHN SWALLOW.

In a conviction, if the defendant appear and plead and the evidence be given on the same day, the Court will intend that the evidence was given in the defendant's presence, even though it be stated that the appearance was at *A.* and that the evidence was given at *B.*—A defendant may be convicted of several offences in the same conviction.

THIS was a conviction against the defendant in the sum of 15*l.* for three penalties under the game laws. By the record of conviction it appeared that at *Kelling* in the county of *Norfolk* the informer came before *Z. Girdlestone* one of the justices &c. of *Norfolk* &c. and swore that on three several days (mentioning them) at the parish of *Waybourn* in the said county the defendant kept and used steel traps and engines to kill and destroy the game &c. That afterwards on a subsequent day, the 27th of *October*, the defendant, having been summoned, appeared before the justice to make his defence against the said charges, and having heard the same was asked by the said justice if he could say any thing for himself why he should not be convicted &c.; that he pleaded not

guilty;

guilty; that on the said 27th day of October at Holt in the county aforesaid, one credible witness, J. C., on his oath swore &c.

"And thereupon the said defendant on the said 27th day of October &c. at Holt aforesaid before me the said justice by the oath &c. is convicted, and for his several offences aforesaid hath forfeited the sum of 5*l.* for each offence, making together the sum of 15*l.* to be distributed as the statute directs."

Wilson, for the defendant, took several objections to the conviction. First, It does not appear on the conviction at what place the defendant was summoned to appear, nor at what place he did appear: it should appear to be at a place where the justice had jurisdiction. If it be considered that it was at *Kelling*, the place before mentioned, then

Secondly, it does not appear that the evidence was given in the presence of the defendant. And though in *R. v. Thompson*, ante, 2 vol. 23, where the whole transaction before the magistrate appeared to have passed on the same day, the Court said they would presume that the evidence was given in the defendant's presence (a), it is observable that there only one place was mentioned in the conviction, so that such a presumption might reasonably be made. But here another place (*Holt*) is mentioned, where the witness was examined; and therefore the same presumption does not arise as in that case. On the contrary, the fair inference from the whole of what is stated in the conviction is that the defendant appeared at *Kelling* according to the summons, and that then an adjournment of the meeting to *Holt* took place, which excludes the presumption of the evidence having been there given in his presence.

Thirdly, The defendant is charged with three offences, and the conviction is general, without saying of how many. Perhaps it may be doubted whether a defendant can be convicted in more than one penalty in the same conviction: but at all events the adjudication should distinctly shew the number of penalties in which he is convicted. A conviction for the said offence when several are charged, is bad. *R. v. Salomons*, ante, 1 vol. 249; 2 *Rol. Abr.* 696. pl. 7. A general verdict, finding the point in issue by way of argument for the plaintiff or defendant, is never permitted, though the argument be necessary and concluding. *Vaugh.* 75. And though it is added in this case that "for his

(a) See also *R. v. R. Aikin*, 3 *Bur.* 1786.; *R. v. Kempson*, *Corwp.* 241.; and *R. v. Levett*, ante, 7 vol. 153.

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The KING
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several offences aforesaid he hath forfeited 5*l.* for each offence, making together 15 *l.*," that is merely stated as a consequence of the informal conviction which precedes and which cannot be cured by it. But

The Court (stopping *Mingay*, who was to have argued in support of the conviction) overruled all the objections.

LORD KENYON Ch. J. said, As to the first objection, It will be understood that the summons to appear and the appearance were at *Kelling*, the place before mentioned. Secondly, There would, I think, be great weight in this objection, if it had not been already overruled in former cases; and notwithstanding the introduction of another place (*Holt*) I think that this case must be governed by those. Thirdly, There is no objection to the conviction on the ground that the defendant has been convicted of several penalties. It is the constant practice in actions on the game laws, and not unfrequent in convictions. Even in indictments for capital offences several offences are sometimes charged, as burglary and stealing in a dwelling house to the value of 40*s.* I by no means wish that magistrates in drawing up convictions should set all forms at nought: but they ought not to be entangled in greater forms or ceremonies than the superior courts. The word "convicted" in this case applies to the several offences with which the defendant was charged and to the evidence given in support of them; and the following words are "and for his several offences *aforesaid* &c." Taking the whole of the adjudication together, it is evident that the magistrate convicted the defendant in the three several offences charged.

Conviction affirmed.

Saturday,
June 1st.

The KING *against* The CONSERVATORS of the River
Tone in the County of *Somerset*.

By the 10 and
11 W. 3. c. 8.
the proprie-
tors of navi-
gation shares
in the river

BY an act of the 10 and 11 W. 3. c. 8. "entitled an act for
"making and keeping the river *Tone* navigable from *Bridge-*
"water to *Taunton*" &c. reciting that *John Mallet* Esq. in pur-
Tone are created a corporation with certain funds, directed to keep an account of their receipts and disbursements, which shall every year be examined, stated, corrected, and allowed, by the Bishop of B. and W. and the Justices of the peace for the county of *Somerset* or any five or more at their first general Quarter Sessions after a certain day, at which time they are to direct a distribution of the surplus profits if any: held that the Sessions in one year have no authority to revise or correct any errors in the accounts, upon which a balance was struck and allowed at the Sessions in any preceding year.

fuance of a commission under the great Seal in the 13 Car. 1. had at a great expence made the river in some sort navigable; in consequence of which King *Charles II.* by Letters Patent in the 36th year of his reign had granted to the said *J. Mallet* the sole navigation of the river within certain limits, and reciting that *Mallet's* interest in the same had been conveyed to certain persons by name who were purchasers for a valuable consideration, and that they had engaged to keep the river navigable at their own expence; it is enacted that the same persons and their successors shall be appointed Conservators of the said river; and it gives them power to preserve the navigation and to remove obstructions &c. And "for reimbursing the said Conservators the principal money of the said purchase, and what shall be laid out in the making or keeping the said river navigable, or in making or repairing bridges over the said river, or in any other works, together with interest for the same after the rate of 6l. per cent. per annum, until the said Conservators shall be repaid the said principal and interest of what they have or shall disburse for the purposes aforesaid," the act imposes certain tolls payable to the said Conservators. It then enacts that "from and after the said Conservators shall have been fully reimbursed and paid the principal and interest after the rate aforesaid of all monies advanced and which shall be expended by them respectively in purchasing the interest of the heirs of the said *J. Mallet*, and in making and keeping the said river navigable &c., the tolls are to be reduced to a certain sum, to be applied to the repair of the locks and other works, and the surplus (if any) to be employed for the use of the poor of *Taunton*. It then enacts that a true account of all expences and disbursements and of all tolls received by the said Conservators shall be duly kept in certain books to be kept by the said Conservators for that purpose; and that every year the said books and account and the vouchers for the same shall be brought before the Bishop of Bath and Wells for the time being and the Justices of the peace for the county of Somerset for the time being, or any five or more of them, at such time and place within the town of *Taunton* or ten miles thereof as any three or more of them shall appoint, then and there to be examined stated corrected and allowed; and the said lord Bishop and Justices or any five or more of them are thereby impowered to examine state correct and allow the said accounts, and to appoint and make distribution of all that shall

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have been received that shall not have been ordered to be laid out in the said navigation to and amongst the said Conservators their executors &c, in proportion to the money advanced by them respectively in the first place, for the payment and discharge of the interest after the rate aforesaid due to every of them for the money advanced by each, and as often as there shall be any surplus in the like proportion for the lessening and in discharge of the principal so advanced by them respectively, until the whole principal and interest shall be paid and discharged; *which account of the receipts of every year shall end and be made up to the 24th of June inclusive, and shall be examined stated corrected and allowed, and distribution thereof made by the said lord Bishop and Justices or any five or more of them at the next general quarter Sessions of the peace that shall be held for the said county of Somerset after the said 24th of June.* It then gives power to the same persons to examine persons on oath touching the said accounts. And when the said account of any year shall have been so examined stated and allowed by the said lord Bishop and Justices or any five or more of them, a duplicate thereof shall be made signed and sealed by the said lord Bishop and Justices or any five or more of them, and shall be transmitted to and kept amongst the records of the Sessions of the peace of the said county of Somerset. It then directs in what manner the perpetual succession of the Conservators shall be preserved.

Then the act of the 6th of *Anne*, c. 9. reciting the last mentioned statute and the tolls thereby granted, and reciting that the navigation was partly made but not completed, and that it would be necessary to expend a further considerable sum of money for that purpose "notwithstanding the great sum already disbursed by the said Conservators in the said work, *which by an account taken stated and allowed by the Justices at the general quarter Sessions of the peace holden at Bridgewater the 17th of July last for the said county of Somerset appears to have been 3566l. 9s. 5¼d.*" It therefore grants additional tolls; and enacts that "after the said Conservators shall be reimbursed their principal monies and interest, after the rate in the before recited act mentioned already by them expended and to be expended &c. in repairing &c. together with the expences of the said Conservators, *which the said Justices at the general quarter Sessions are authorised and thereby required to allow, as by the said former act is directed,*" then the tolls are to be lessened.

It

It appeared by affidavits laid before the Court that from the year 1710 to the present time the Conservators of the river *Tone* had delivered in annual accounts to the justices of their disbursements and receipts, which until the account hereafter-mentioned were signed and allowed by five or more justices, in each of which certain balances were reported to be due to the Conservators. That the balance of the account in the year 1710 was 5146*l.* 6*s.* 9½*d.*, which had increased every succeeding year, and in 1796 amounted to 69,779*l.* 16*s.* 5½*d.*; and the accounts so allowed were deposited amongst the records of the court.

At the General Quarter-Sessions of the peace holden for the said county on the 11th of *July* 1798, the following order was made by the said Justices; "On hearing counsel as well on behalf of the Conservators of the river *Tone*, as on behalf of the poor of *Taunton*, this Court is of opinion that all and singular the accounts of the said conservators are inquirable into by this Court, and that the jurisdiction of this Court upon this subject is not concluded by any thing heretofore done by the proceedings already had; and this present Sessions is continued by adjournment to the Guildhall in *Taunton* on *Monday* the 20th of *August* for the purpose of examining stating correcting and allowing the said accounts and making distribution thereupon, according to the provisions and in pursuance of the acts of parliament in that case made and provided; and this Court is of opinion that on making up such accounts interest should not be allowed on any interest monies which may remain at any time in arrear since passing the said acts of parliament." The order then proceeded to direct the necessary notices to be given and vouchers to be produced. And at a further adjourned Sessions on the 28th of *September* 1798 the following order was made; "Upon application to this Court by the Conservators of the river *Tone* to allow their accounts ending and made up to the 24th of *June* last inclusive, in which they claim a balance of 76,825*l.* 6*s.* 8*d.* to be due to them for money advanced and disbursed and the interest thereof, and upon examining into the said accounts and hearing the said Conservators &c, and it being admitted by the said Conservators that there are considerable errors in the said accounts and the treasurer of the said Conservators having refused to swear to the truth of the said accounts, this Court is of opinion and doth find manifest great errors mistakes and frauds in the said accounts, and inaccuracies in the statements thereof, and doth therefore in pursuance of the

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statutes &c. state correct and allow the said accounts, by which it appears that the said Conservators have been reimbursed all principal monies advanced and disbursed and interest thereupon, and that there is now in the hands of such Conservators a balance of 9425 *l.* 19 *s.* 6 $\frac{1}{2}$ *d.* to be applied as by the said acts are directed; and the same accounts are so stated corrected and allowed accordingly, and the said balance of 9425 *l.* 19 *s.* 6 $\frac{1}{2}$ *d.* ascertained to be in the hands of the said Conservators, which accounts so stated corrected and allowed are as follow", (setting out the account.)

The above-mentioned orders having been removed by writ of certiorari into this court, a rule was granted to shew cause why the last mentioned order of Sessions for stating correcting and allowing the accounts of the defendants should not be quashed for insufficiency; which rule was now supported by

Erskine, Gibbs, and Lens; who objected to the order, First, on the merits; because by the general rule when a balance is struck between parties interest runs upon the whole from that time: and in this instance the statute of *Anne* recognizes the practice which had obtained from the passing of the act of King *William*, of adding the interest which was left unpaid at the end of each year to the principal, and making the whole balance carry interest for the succeeding year. Secondly, because the magistrates in Sessions had no jurisdiction by those statutes to revise and alter the balance which had been struck and allowed the preceding year by other magistrates having co-ordinate jurisdiction; and the injustice would be greater in this instance, because upon the faith of this mode of proceeding having remained unquestioned for so many years the shares of this navigation had been transferred like public stock from hand to hand, and the subsistence of many families depended upon it.

Bond, Tripp, and Pell, contra. First, the charge of interest upon interest is illegal, and no usage can make it good. It does not follow, because in striking the balance which is referred to in the statute of *Anne* that it was so done once, therefore it is authorised to be continued every succeeding year. And unless that be the construction, the balance struck in the last year by the justices is the correct one. Secondly, The justices had authority under the statutes in question to revise and correct errors in the accounts of the preceding years, especially such as appear upon the face of the accounts themselves. This may be compared to the jurif-

dition exercised in the Court of Chancery by its general authority over trustees to bring them to account even after a great lapse of time, and after a settlement made and a balance struck. The cases of *Attorney General v. The Corporation of Coventry* (a), *Vernon v. Vandrey*, 2 *Eq. Cas. Abr.* 12. and 3 *Chan. Rep.* 10. were referred to in the course of the argument. It was also contended that the accounts directed to be delivered to the justices were not matters of record, but were only directed to be kept for greater security amongst the records of the Sessions; and were not of a more authentic nature than the accounts of any other public body.

Lord KENYON Ch. J. Of the upright intention of the magistrates, when they made the order in question, no doubt can be entertained; they wished to correct the errors in the former accounts. But, without approving or disapproving of the manner in which the former accounts had been kept, the only question here is, whether or not the magistrates had jurisdiction to make this order; I think they had not. This is a power not belonging to their situation as magistrates generally, but given to them by a particular statute for a special purpose. They are from year to year to examine and balance the accounts; when they proceed to the examination of the accounts of the preceding year, they are to take it for granted that all the former balances are right; and when they have examined and balanced the accounts for any one year, they are become *functi officio*; their authority being executed, they have nothing further to do. If flagrant injustice has been done in any prior year, the public are not thereby concluded; that may be rectified by another jurisdiction, the Court of Chancery: but the justices at the Sessions have no such jurisdiction. A new æra begins with them every year, and their jurisdiction concludes with the year. The balance settled in the preceding account is to form the first article of the ensuing account. If they discover that any improper allowances have been made in any former years, such as allowing interest upon interest, they may correct the abuse for that year, but they have no power to reform what has been done in prior years. Great injustice might also be done if the jurisdiction now claimed were allowed; vouchers may have been lost, many of the shares of this navigation may have been purchased at a full price, and they may now be the support

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(a) This arose out of the same case as is reported in 2 *Bro. Parl. Cas.* 236.

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of different families, and various other inconveniencies might follow; and even the Court of Chancery will not correct every error in an account of long standing, where great inconvenience would ensue from unravelling it. It is sufficient however in this case to say that the justices at the Sessions had no authority to overset that which other justices, having a co-ordinate jurisdiction, had before settled, and that the present order cannot be supported.

GROSE J. In looking over these accounts it appears to me that many allowances have been made, which (I think) I should not have approved: but I must also add that we cannot examine the accounts, since we have no authority to correct them. By the order in question the justices at the Sessions claimed the right of examining all the accounts from the year 1710: but they have no such power. They certainly had not this power at common law; nor is any such given to them by the act of parliament; for that only authorises them to take an account for each year, and to make a distribution. The justices therefore had only a power to examine the accounts of the last year: if they could unravel the accounts of former years, by the same reason the last accounts might be unravelled at some future Sessions; and thus, instead of being finally adjusted, the accounts must at last be left in inextricable confusion.

LAWRENCE J. The authority of the justices is confined to the examination and allowance of the accounts for the year preceding the time when they are to be settled. Probably the magistrates, who made this order, were struck with the impropriety of some allowances made in the former accounts, and very properly wished to correct the error: but this is an error that has been going on from time to time. And though the interest may now be considered as great in respect to the sums subscribed in the time of Queen Anne, perhaps the present holders of these shares have paid an equivalent for them on the supposition that what had been before allowed was legal. But however this may be, the authority of the justices was circumscribed within certain limits.

Per Curiam,

Order of Sessions quashed.

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The KING against J. WRIGHT.

Monday,
June 3d.

A RULE having been obtained, calling on the defendant (a book-feller) to shew cause why a criminal information should not be granted against him for printing and publishing a libel on *J. Horne Tooke*,

Law, Gibbs, and C. Moore, were now to have shewn cause against it; but after producing an affidavit made by the defendant, in which he stated that the charge on *Mr. H. Tooke* was a paragraph contained in the report of the Committee of Secrecy of the House of Commons (a) a literal copy of which he had published, and that he did not publish the report with a view to calumniate *Mr. H. Tooke*, the Court called on the counsel for the prosecutor to support the rule. The paragraph complained of, and which was contained under the title "Attempts to assemble a convention of the people in *England*," was as follows; "Some of the persons so arrested were prosecuted for high treason. A grand jury for the county of *Middlesex* found a bill against *Thomas Hardy*, the secretary of the *London Corresponding Society*, and eleven others; three of the persons so indicted, *viz. Thomas Hardy, John Horne Tooke, and John Thelwall*, were tried, and on their trials were acquitted of the charge in the indictment. But the evidence given on those trials established, in the clearest manner, the grounds on which the committees of the two houses of parliament had formed their reports in 1794; and shewed beyond a possibility of doubt that the views of these persons and their confederates were in their nature completely hostile to the existing government and constitution of this kingdom, and went directly to the subversion of every established and legitimate authority."

Erskine and Warren in support of the rule. First; The matter published, supposing the matter not sanctioned by any legal authority, is a libel on *Mr. Horne Tooke*. Secondly; It is such a libel that the Court are bound by the rules that have always guided their discretion in similar cases to give the prosecutor leave to file a criminal

The Court refused to grant a criminal information against a bookseller for printing a report of the House of Commons, though it reflected on the character of an individual.

(a) "To whom the several papers referred to in his Majesty's message of the 22d of Jan. 1799 and which were presented, sealed up, to the House by Mr. Secretary Dundas on the 23d of Jan. by his Majesty's command, were referred; and who were di-

rected to examine the matters thereof and report the same as they should appear to the House;" Ordered by the House to be printed for the use of the members the 15th of March 1799.

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information against the publisher. Thirdly; The House of Commons themselves were not justified in directing or giving a sanction to the publication of this libel on Mr. *H. Tooke*; or at all events they have no legal authority to direct or sanction the publication of matter that amounts to a libel on any individual beyond an entry on it's own journals or for the use of the members of the House. Fourthly; But even if they possess such an extraordinary power, the house having in this instance only directed an entry on it's own journals and ordered the printing (by their own printer) of as many copies of this report as were sufficient for the use of the members of the house, that does not give the defendant, a stranger, the right of printing and circulating copies of it so as to furnish him with a legal defence either to an action for damages or to an information or indictment for a libel. In support of the two first propositions the counsel read and commented upon the passage in question. Thirdly; The House of Commons were not justified in making the report in question, inasmuch as it reflected on innocent individuals. It is the undoubted right of every subject, who is accused of a crime, to be tried by a jury of the country; and as it appeared on the former part of this very paragraph that Mr. *H. Tooke* had been acquitted by a jury, it was a foul libel on him to say that he was guilty of the crime of which he had been acquitted. In the case of *R. v. Sir W. Williams* (a), where an information was filed against the defendant who had been Speaker of the House of Commons for publishing a libel, *Dangerfield's Narrative*, it was determined by this Court that the defendant was not justified in publishing, though he had published as Speaker and by order of the House of Commons. This determination still remains in force, notwithstanding several attempts in parliament to get rid of it. And Sir *Robert Atkyns* in his Treatise on the Power Jurisdiction and Privilege of Parliament vindicates the legality of this determination. This decision therefore proves that the House of Commons themselves cannot justify the publishing of any matter reflecting on an innocent individual. In the case of *Cuddington v. Wilkins* (b), where the plaintiff brought an action for words accusing him of felony, which the defendant justified, and the plaintiff replied a pardon, it was adjudged for the plaintiff; "for the whole Court were of opinion that though he were a thief once yet when the pardon came it took away not

(a) 2 Show. 471; Comb. 18; 10. St. Tr. App. 33. n.

(b) Hob. 81.

only

only poenam but reatum." Now that is a stronger case than the present; for there it was admitted that the plaintiff had been guilty of the felony though he had been pardoned; but here Mr. *H. Tooke* was innocent of the charge, for the jury acquitted him of it. Though the House of Commons may be invested with a right of enquiring into the existence of high crimes either for the purpose of impeaching an individual or of making new laws, it is evident that the enquiry in this instance could not have been made for the purpose of impeaching Mr. *H. Tooke*, since he had been before legally acquitted of the charge; and if the report were made as the foundation of any legislative act, it ought not to have charged persons to be guilty of a crime of which a jury had previously pronounced them innocent. But even if the House of Commons cannot be called to account for making this report, they could not sanction the publication of it beyond an entry on its own journals and printing copies of it for the use of their own members. Fourthly, In the case of *Lake v. King* (a) where a petition was presented to a committee of the house for examination of grievances, reflecting on the plaintiff's conduct, and the defendant distributed printed copies to the members of the committee, it was not pretended that the defendant could distribute the copies to other persons not members of the house; and this Court said "that the printing with intent to deliver the copies to members of the committee was justifiable, *but if he had delivered them to others it would be otherwise*". Now in this case the defendant has published copies of this report for general circulation. It is even a contempt of Court to publish the proceedings of Courts of Justice, and still more so where those proceedings reflect on the character of an individual. In *Waterfield v. The Bishop of Chichester* (b), where the defendant complained to the court of King's Bench that the plaintiff had printed and circulated an account of a prohibition obtained by him against the Bishop, "The Court declared it to be a most seditious libel, and gave order to enquire after the printer that he might be prosecuted." It is also a breach of privilege and a contempt of the House of Commons to publish their proceedings without their authority; and yet that is the only defence which the defendant now attempts to make against this charge: but it seems rather extraordinary that the admission of one crime should be set up as a justification of another.

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See post. 298.

(a) 1 Lev. 240.

(b) 2 Med. 118.

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LORD KENYON Ch. J. When the motion was first made, I suggested to the counsel for the prosecutor that if the publication in question really were, what it professed to be, a copy of the report of the House of Commons, it would be wrong to grant a rule to shew cause: but it not being then admitted to be a true copy, and it being surmised that the publication assumed a title that did not belong to it, we granted a rule nisi; but as it now proves to be a true copy of the report, I think there was not the least pretence for the motion. This is an application for leave to file a criminal information against the defendant for publishing a libel; so that the application supposes that this publication is a libel. But the enquiry made by the House of Commons was an inquisition taken by one branch of the legislature to enable them to proceed further, and adopt some regulations for the better government of the country: this report was first made by a Committee of the House of Commons, then approved by the House at large, and then communicated to the other House, and it is now sub judice; and yet it is said that this is a libel on the prosecutor. It is impossible for us to admit that the proceeding of either of the Houses of Parliament is a libel; and yet that is to be taken as the foundation of this application. The case of *R. v. Sir W. Williams*, which was principally relied upon, happened in the worst of times: but that has no relation to the present case. There the publication was the paper of a private individual; and under pretence of the sanction of the House of Commons an individual published: but this is a proceeding by one branch of the legislature, and therefore we cannot enquire into it. I do not say that cases may not be put in which we would not enquire whether or not the House of Commons were justified in any particular measure; if, for instance, they were to send their Serjeant at Arms to arrest a Counsel here who was arguing a case between two individuals, or to grant an injunction to stay the proceedings here in a common action, undoubtedly we should pay no attention to it. But the report in question, being adopted by the House at large, is a proceeding of those who by the Constitution are the guardians of the liberties of the subject; and we cannot say that any part of that proceeding is a libel. I am therefore clearly of opinion that this rule ought to be discharged.

GROSE J. This is a motion for leave to file a criminal information for publishing a supposed libel, but in truth for publishing
a pro-

a proceeding of one branch of the legislature when they were acting for the safety of the state. Now on looking into the judicial proceedings of this Court, I find no instance of such an information as the present. The case of *R. v. Sir W. Williams* is most like this case: but it must be remembered that that was declared by a great authority to be a disgrace to the country.

LAWRENCE J. This case has been chiefly argued on two grounds. First, It is said that the report of the House of Commons is itself unjustifiable, inasmuch as it imputes a crime to the prosecutor and deprives him of his privileges. It is said that this report charges him with being guilty of high treason, notwithstanding a verdict of the jury had ascertained his innocence: but that is not the fair import of the paragraph. It is possible that a man may have views hostile to the government and constitution of the kingdom without being guilty of high treason, especially of the particular treason imputed to the persons there mentioned. It does not therefore follow that this report charges those persons with the same crime of which they had been before acquitted. But the chief ground taken by the prosecutor's Counsel is that, though the report of the House of Commons cannot itself be considered as a libel, the defendant not acting under the authority of the House may be indicted for publishing it with a view to general circulation. It has been said that the publication of the proceedings of Courts of Justice when reflecting on the character of an individual is a libel; to support which position the case of *Waterfield v. The Bishop of Chichester* has been cited. But on examining that case it appears that the charge there was that the plaintiff had not published a true account. There the plaintiff suggested for a prohibition that the Bishop had excommunicated him for refusing to take *the oath ex officio* on his being chosen church-warden of *Arundel*: it afterwards appeared that he was excommunicated for having refused to take *the oath of a church-warden according to law*; and the ground of the prohibition being false, a consultation was awarded: then the plaintiff published a supposed account of the prohibition, entitled "*A true copy of a writ of prohibition granted &c. against the Bishop of Chichester who had proceeded against and excommunicated one T. Waterfield, a church-warden, for refusing to take the oath usually tendered to persons in such office*"; by which writ the illegality of all such oaths is declared &c." Now that publication was not a true statement of

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the proceedings of the Court: he at first obtained the prohibition on a false representation of the fact, and after the consultation was awarded he published a false account of the proceedings in prohibition; and the Court declared that such false account was a seditious libel. Therefore I do not think that that case establishes the proposition to support which it was cited; and I am not aware of any authority that does support it. The proceedings of Courts of Justice are daily published, some of which highly reflect on individuals, but I do not know that an information was ever granted against the publishers of them. Many of these proceedings contain no point of law, and are not published under the authority or the sanction of the courts, but they are printed for the information of the public. Not many years ago an action was brought in the Court of Common Pleas by Mr. *Currie* against *Walter*, proprietor of "The Times," for publishing a libel in the paper of "The Times," which supposed libel consisted in merely stating a speech made by a counsel in this court on a motion for leave to file a criminal information against Mr. *Currie*: Lord Chief Justice *Eyre*, who tried the cause, ruled that this was not a libel, nor the subject of an action, it being a true account of what had passed in this court; and in this opinion the Court of Common Pleas afterwards, on a motion for a new trial, all concurred, though some of the judges doubted whether or not the defendant could avail himself of that defence on the general issue. Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of Justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings. The same reasons also apply to the proceedings in parliament: it is of advantage to the public and even to the Legislative bodies that true accounts of their proceedings should be generally circulated; and they would be deprived of that advantage if no person could publish their proceedings without being punished as a libeller. Though therefore the defendant was not authorised by the House of Commons to publish the report in question, yet as he only published a true copy of it, I am of opinion that the rule ought to be discharged.

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Friday,
June 7th.GREGORY and HONOUR his Wife *against* HILL.

THE declaration stated that the defendant on &c at &c. with force and arms made an assault on the plaintiff's wife, and then and there beat bruised wounded and ill-treated her, and then and there gave and struck her divers and repeated blows and strokes on divers parts of her body, and then and there with great force and violence several and repeated times knocked her down upon the ground, whereby &c.

To this the defendant pleaded that before and at the time when &c. he was possessed of a certain dwelling-house situate &c. which he then inhabited with his family, and that the said *Honour* before the said time when &c. entered into the said house, and continued therein without the license and against the will of him the defendant, and then and there made a great noise and disturbance therein, and disturbed the defendant and his family in the said house, whereupon the defendant requested she would cease her said disturbance and quietly depart out of the said house, which she refused to do, whereupon the defendant gently laid his hands upon her to turn her out of the said house, as it was lawful for him to do, which is the same assaulting beating bruising wounding ill-treating and striking the said *Honour* divers and repeated blows and strokes, and knocking her down upon the ground, whereof the plaintiffs have above complained against him, without this that the defendant is guilty of the premises aforesaid at the place aforesaid or elsewhere out of the said house at &c.; and this he is ready to verify, wherefore &c.

To this plea the defendant demurred, and assigned for causes, that it alleges no sufficient justification or excuse, nor any denial of the battery bruising wounding and ill-treating of the said *Honour*, and striking the said blows and strokes, and knocking down the said *Honour* upon the ground, in the introductory part of the said plea mentioned.

Marryat was to have argued in support of the demurrer, and *Espinasse* against it: but

The Court said the case was too plain for argument; that though a plea of *molliter manus imposuit* would justify what the law considers as an assault, such as might be necessary to have put the party out of the house without outrage and violence, yet it never

A plea of
molliter manus imposuit
in order to
turn the
plaintiff out
of the defend-
ant's house
where she
continued a-
gainst his
will is no an-
swer to a
charge a-
gainst the
defendant
for striking
the plaintiff
repeated
blows and
with great
force and
violence se-
veral times
knocking
her down.

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was considered as any answer to a charge, such as is contained in the declaration, of beating wounding and knocking the party down. And they adverted to the case of *Collins v. Renison* (a), where to an action of trespass alleging that the defendant overturned a ladder on which the plaintiff was standing and threw him from it on the ground, the defendant pleaded that he was possessed of a garden and that the plaintiff against his will set up a ladder there and went up the ladder in order to nail a board to the plaintiff's house, that the defendant forbid him, and requested him to come down, and that the plaintiff persisting in nailing the board the defendant gently shook the ladder and gently overturned it, and gently threw the plaintiff from it on the ground, doing him as little damage as possible, which was holden bad on demurrer.

The defendant had leave to amend.

(a) *Sey. Rep.* 138.

Friday,
June 7th.

DOE on the Demise of MITCHINSON against CARTER.

If a tenant under covenant not to "let, set, assign, transfer or make over" &c. the indenture of lease, give a warrant of attorney to confess judgment to a creditor for the express purpose of enabling such creditor to take the lease in execution under the judgment; this is in fraud of the covenant, and the landlord under a clause of re-entry in the lease for breach of the condition may recover the premises in ejectment from a purchaser under the sheriff's sale.

IN ejectment, tried at the last assizes for *Essex* before *Perryn B.* a verdict was found for the lessor of the plaintiff, subject to the opinion of this Court on a case which stated the same facts verbatim as appear in the report of the case between the same parties *ante* 57, with this addition; that "The warrant of attorney was executed for the express purpose of getting possession of the lease, which was not to be had because it was in the teeth of a covenant directly to the contrary; and *Braban* concurred in that intention."

Best, for the lessor of the plaintiff, said that this differed from the case before determined between the same parties, because here the jury found as a fact that the warrant of attorney was executed for the express purpose of getting possession of the lease. This therefore was an act in fraud of the covenant; and which *Lawrence J.* observed in the former case would amount to a forfeiture of the lease by the tenant. He was then stopped by the Court.

Parntker contra. It does not follow because the warrant of attorney was executed for the purpose of the tenant's creditor getting possession of the lease, therefore it was *in fraud* of the co-

tenant.

tenant. Fraud cannot be inferred by the Court, it must be specifically found; and it is not found in this case. If indeed there had not been a bona fide debt before due from the tenant to his creditor, but that had been set up as a pretence on which to give the warrant of attorney and found the subsequent proceedings, fraud might justly be imputed; but as there existed a bona fide debt, the judgment on the warrant of attorney is as much in invitum as if no such warrant of attorney had been given; and so it was considered by Lord *Kenyon* in the former case. The warrant of attorney was extorted from the debtor by reason of his necessitous situation: and if he had no other property except this lease which could be taken in satisfaction of the debt, the parties could not but intend that it should be taken, without any idea of acting in fraud of the covenant. The warrant of attorney itself gave the creditor no specific lien on this estate, which alone was before considered by Lord *Kenyon* as falling within the words of the proviso; but, as his Lordship observed, it only gave the creditor a power to enter up judgment against the tenant; and non constat it would be followed up by the term being taken in execution.

LORD KENYON Ch. J. When this case first came before the Court the rules that were likely to govern it were so explicitly stated that I thought we should have heard no more of it. The covenant not to assign and the proviso to enforce it were both legal at the time; and indeed it was prudent for the landlord to take this care that an improper tenant should not be obtruded on him. When the former question arose, the Court to a certain degree relaxed the severity of the covenant; and they then said there was no forfeiture because all that was stated was that a fair creditor had used due diligence to enforce the payment of a just debt, and that the lease was taken from the tenant against his consent by judgment of law. But when it is now stated that this step was taken for the express purpose of getting possession of the lease, and that the tenant consented to it, it would be ridiculous to suppose that a Court of Justice could not see through such a flimsy pretext as this. Here the maxim applies, that that which cannot be done per directum shall not be done per obliquum. The tenant could not by any assignment, under-lease or mortgage, have conveyed his interest to a creditor; and consequently he cannot convey it by an attempt of this kind. If the lease had been taken

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by the creditor under an adverse judgment, the tenant not consenting, it would not have been a forfeiture: but here the tenant concurred throughout, and the whole transaction was performed for the very purpose of enabling the tenant to convey his term to the creditor.

GROSE J. No man can avail himself of his own fraud to avoid the law. We have instances even in the criminal law where a man shall not be permitted to avoid the law by fraud. The definition of burglary is a breaking and entering a house in the night-time with intent to commit a felony: and if a man under the pretence of serving an ejectment get into a house in the night-time for the purpose of a robbery, it is burglary, though in point of fact there be no breaking. Now here the tenant did not in terms assign the lease, but he did that which was equivalent: it was an attempt to evade the covenant, and was intended as a fraud on the landlord.

LAWRENCE J. The defendant contends that this case does not substantially differ from the former case, because he says that, notwithstanding what is here stated, this was a proceeding against the tenant in invitum. But how can it be considered to be in invitum, when it is stated that the warrant of attorney was executed for the express purpose of getting possession of the lease, which could not otherwise be obtained, and that the tenant concurred in that intention? The parties were aware that this lease could not be directly assigned by the lessee in satisfaction of his debt; and therefore they agreed to do that by the appearance of an adverse judgment which by their own act they could not effect; so that it was to appear to be done in invitum when in truth it was done voluntarily.

Postea to the plaintiff.

Friday,
June 7th.

MARGARET M'NAMARA *against* FISHER.

Writ of error
having been
quashed be-
cause
brought by a
feme covert,
the defend-
ant in error
is entitled to
costs under
stat. 4 An. c.
16. s. 25.

THE defendant in error having recovered a judgment in an action of assumpsit in the Court of Common Pleas, the plaintiff in error brought a writ of error, without joining her husband, and assigned her coverture as error in fact, to which the defendant in error pleaded in nullo est erratum. The writ of error was quashed in the last term, on the ground that a feme covert

could

could not sue out a writ of error without her husband. But the Master having some doubt whether or not the defendant in error were entitled to the costs on the writ of error under the statute 4 An. c. 16. s. 25. (a),

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A motion was made to direct the Master to tax the defendant in error his costs of quashing the writ.

Barrow now shewed cause against that rule; contending that the statute only gave costs in cases where the judgment might be affirmed, whereas here it appeared upon the record that the plaintiff in error was a feme covert, against whom the judgment could in no event be affirmed. But

The Court (stopping *Henderson* in support of the rule) said there was no reason why the defendant in error in this case should not have his costs. And they referred to the case of *Cooper v. Ginger* (b), where it was holden that the statute was not confined to those cases only where a variance from the original record was assigned as error, but that it extended to all writs of error by reason of the words in the statute "or other defect."

Rule absolute.

(a) "For preventing great vexation from suing out defective writs of error, it is enacted that upon quashing any writ of error to be sued out after the said first day of *Trinity* term for variance from the original record or other defect, the defendant

in such error shall recover against the plaintiff issuing out such writ his costs as he should have had if the judgment had been affirmed, and to be recovered in the same manner."

(b) 1 *Str.* 606; and 2 *Lord Raym.* 1403.

Dr. MOISES against Dr. THORNTON.

Saturday,
June 8th.

THE plaintiff, a physician, brought an action against the defendant for slander for saying of him in his profession "*He is a quack; and if he shews you a diploma it is a forgery:*" and in the declaration the plaintiff averred that he was a physician, and had *duly taken the degree of doctor of physic.*

In support of that averment he produced at the trial, before Lord *Kenyon* at the sittings after last term, a diploma, purporting on the face of it to be granted by the University of *St. Andrew's* in *Scotland*, and to have the University seal appeandant to it. And in order to authenticate the instrument, the plaintiff's counsel offered to call a witness of the name of *Hague*, who had been sent into *Scotland* for the purpose, (having before had no know-

The mere production in court of a diploma of doctor of physic under the seal of one of the Universities is not in itself evidence to shew that the party named in the diploma is entitled to that degree.

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ledge of that University, its constitution, or professors,) and who was ready to prove that he attended in the public library of the University, and applied to the persons there assembled in their public capacities of rector and professors of the University, and that the persons so assembled acknowledged to him that the signatures subscribed to the diploma conferring the degree of doctor of physic on the plaintiff were of their proper handwriting respectively; and that they informed him that the same was granted by the University in full senate, and in further confirmation thereof the witness had seen each professor sign a certificate in his presence, (corresponding with the handwriting of their signature to the diploma) which certificate was as follows; "University Library *Saint Andrew's*, April 13th 1798. Sederunt. Doctor *Hill*, Rector, Doctor *Arnot* &c. (naming several other members present.) The University agree to confer the degree of doctor of medicine on Mr. *Hugh Moises* of *Pimlico* late surgeon to the *West Middlesex* Regiment, on testimonials from *George Pearson* M.D. of the College of Physicians *London* and lecturer on physic, and *Andrew Thynne* M.D. of the College of Physicians *London*, and lecturer of midwifery.

" Extracted from the University records by

" JN^o COOK, Cl. Univ.

" At *Saint Andrew's*, March 21st, 1799.

" That the above is a true and faithful extract of the minute in the original record of the University; that in consequence of the above resolution a diploma was extended and subscribed by the rector, principals, and all the professors, and that the University seal was appended to the said diploma, is certified by *G. H. &c.*" (signed as before stated to have been seen by the witness). The same witness was further informed by the officer, whose duty it was to affix the University seal to their public acts, that the seal affixed to the diploma produced in evidence was such seal, and that he recollected to have affixed the same.

Lord KENYON was of opinion at the trial that this was not sufficient evidence of the facts necessary to authenticate the instrument offered, either that the persons whose names were subscribed to the diploma had authority to grant the same, or that the seal affixed thereto was the proper seal of the University; and therefore nonsuited the plaintiff.

A rule nisi having been obtained, calling on the defendant to shew cause why the nonsuit should not be set aside,

Garrow

Garrow and *Raine* now shewed cause against it. The plaintiff having alleged in his declaration that he was duly invested with the character of doctor of physic which he assumed, and to which the scandal imputed refers, it was incumbent on him to prove it in the same manner as it would have been necessary for the parties themselves, whose signatures are affixed to the diploma, to have done, in case it had been necessary for them to have justified any act of their own under the same authority. In such a case they must have shewn that the University had power by their constitution to grant such a diploma, and that the persons by whom it was issued were authorised to grant the same, and that the seal affixed thereto was the proper seal of the University, and affixed by a proper authority in this instance; and therefore the plaintiff who claims under their authority, and has undertaken by his averment to prove himself duly invested with the character of doctor of physic, was equally bound to prove his title by the same media. But it is clear that the witness offered was himself ignorant of all these circumstances, and could only speak from the hearsay and information of others, who ought to have been called as witnesses. Nor indeed has the witness any knowledge of his own that the persons whom he saw sign the certificate, admitting them to be the same persons who had before signed the diploma, did in fact fill the characters which they assumed.

Erskine, *Gibbs*, and *M^cIntosh*, contra. The Court are bound to take notice that *Saint Andrew's* is an University, authorised by law to grant degrees, it being recognised as such by the act of Union. It is equally notorious that, as a corporation, it can only speak by its seal; and, as in the case of all other corporations which are public bodies, the Court will give credit to its public acts notified by its common seal. Such has been the general practice in proving corporate acts under seal. And they referred to a case some years ago at *Dorchester*, where (it was said) *Buller J.* admitted evidence like the present to prove a similar allegation in a declaration (a). In

(a) *Pickford v. Gutch*, *Dorchester* Summer Assizes 1787, cor. *Buller J.*, was the case alluded to. That was an action by the plaintiff, who was a physician, for calling him a quack, without laying any special damage. To prove an averment in the declaration "that the plaintiff had used and exercised the profession &c of a physician &c." a person who was a surgeon and apothecary was called

who would have proved that the plaintiff for several years had prescribed &c, and that he (the witness) had acted under him as a physician. But *Buller J.* was of opinion that that evidence was insufficient, and that it was necessary to produce the plaintiff's diploma; on which it was produced in court, and the plaintiff recovered.

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this respect, they observed, the seal of a corporation from its notoriety is entitled to higher credit than the seal of a private individual. But at any rate the authenticity of the University seal was put out of doubt by the evidence offered to be given by the witness, who was ready to swear that he saw the rector and professors assembled in their public capacity in their public place of meeting, when they individually acknowledged their subscriptions to the diploma, which they confirmed by signing the certificate mentioned in the presence of the witness, the handwriting whereof corresponded with the names appearing on the diploma. Now the common method of proving instruments to which there are no subscribing witnesses, as in this case, is by proving the handwriting of the parties to the same. There was no occasion for the witness to have personal knowledge of the individuals so signing; for where persons are acting in an acknowledged public capacity, the Court will give them credit for being properly invested with their official characters, at least until the contrary appears. If it were necessary to prove a public act done by the Lord Mayor of *London*, it would be sufficient that the witness saw the act done by a person acting publicly in that character, and invested with the public insignia of the office, although the witness might have no personal knowledge of the man. The diploma is not that which confers the degree, but like the probate of a will is only evidence of it. The sederunt entered in the register of the University is the original document of the degree having been conferred. But as the Courts give credit to the probate issued out under the seal of the Ecclesiastical Court in proof of a will of personalty, so the diploma is evidence under the seal of the University of the degree having been legally conferred. In the ordinary case of admission to the freedom of a corporation, the admission is entered in the corporation books; but a copy of it is given to the freeman, which is evidence of his right. If this had been an action against the University upon a grant under their seal, the acknowledgment of the persons whose names were affixed, convened in their public assembly, that it was their deed, would have been sufficient against them; and if so, it was sufficient for this purpose.

Lord KENYON Ch. J. At the trial a case occurred to my recollection that was brought some years ago by Lord *Cholmondeley* against a defendant for killing game on *Enfield Chase*, when the defendant insisted that he was qualified by his station in life, he

being a doctor of laws; and in order to prove that he was so he produced in evidence the books from the University of *Oxford* which contained the act of the corporation conferring the degree. I thought that that defendant had been properly advised to produce such evidence, because it was the best evidence of the fact; and I thought that the present case on the part of the plaintiff was deficient in proof, because the same sort of evidence was not given. I was of opinion that the diploma proved as it was, and the certificate, were insufficient to prove the plaintiff's allegation that he had duly taken the degree of doctor of physic. The latter I did not consider as a copy taken from the corporation books, but a certificate from certain persons that there had been such an act of the University conferring the degree. It also struck me that some evidence should have been given that this was the corporate seal affixed to the diploma. These were the grounds of my opinion at the trial, and I have heard no arguments to satisfy me that I was mistaken.

GROSE J. In order to prove the averment in the declaration that the plaintiff had duly taken his degree of doctor of physic, the plaintiff produced a piece of parchment with a seal affixed to it. Now to make that evidence it should be either the original act of the corporation conferring the degree, or an examined copy of it. As an original act, it should have been proved that the seal affixed to it was the seal of the University: but no such evidence was given. If considered as a copy, it should have been compared with the original book by the witness who produced it. I therefore think that the diploma offered in evidence was not properly authenticated either as an original or an examined copy.

LAWRENCE J. It is not necessary to prove the seal of a corporation in the same manner as a seal of an individual by producing the witness who saw the seal affixed: but when an instrument having a seal affixed to it, purporting to be a corporate seal, is produced in evidence, it is necessary to prove that it is the seal of the corporation, if there be any doubt about it; otherwise any instrument with a seal to it might be produced in court as an instrument sealed by the corporation. The instrument produced in this case was either the original act, or a copy of it: if it were produced as the original act by which the University conferred the degree, the plaintiff should have proved the instrument by legal evidence. If produced as a copy of the original act, it should

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have been proved in the usual way, as a copy, for the University of *St. Andrew* could not under their seal give evidence that the plaintiff had taken such a degree. Even if it be not necessary in general for the party to shew that he has regularly taken his degree, in this case it was necessary because the plaintiff alleged in his declaration "That he had duly taken the degree of doctor of physic."

LE BLANC J. It was not sufficient for the plaintiff merely to produce the instrument with a seal affixed to it, without giving some evidence to shew that it was the seal used by the University of *St. Andrew*. The instrument was not of itself evidence. If it were necessary to give in evidence some act of the corporation in order to prove that the plaintiff had duly taken a degree, the deficiency in the evidence here was in not producing the book of the corporation, containing the entry of the degree having been conferred, or a copy of that book; and if a copy had been produced, it should have been produced as an examined copy. Therefore I think there was no legal evidence to prove the allegation in the declaration.

Rule discharged.

Saturday,
June 8th.

EXALL *against* PARTRIDGE and Two Others.

The goods of a stranger on the premises of another were distrained by the landlord for rent in arrear; and the stranger was obliged to pay the rent to redeem them; held that the stranger might maintain assumpsit for money paid to the use of the original lessees who were bound by their covenants to the landlord, although

THIS was an action upon promises for money paid, laid out, and expended for the use of the defendants. At the trial before Lord *Kenyon* at the sittings after last term, it appeared in evidence that the three defendants were lessees of certain premises by deed from one *Welch*, to whom they thereby covenanted to pay the rent, and that two of the defendants afterwards with the plaintiff's knowledge assigned their interest to *Partridge* the other co-lessee, who was a coachmaker; subsequent to which assignment the plaintiff put his carriage upon the premises under the care of *Partridge*, where it was taken as a distress by *Welch* the landlord for rent in arrear; and the plaintiff in order to redeem it was obliged to pay the rent due, taking at the time a receipt from *Welch's* attorney as for so much received on account of the three defendants. The present action was brought to recover that sum. The plaintiff was nonsuited, on the ground that the action

some of them had to the knowledge of the plaintiff before he placed his goods on the premises assigned their interest to one of their co-lessees, who was in the exclusive possession at the time.

should

should have been brought against *Partridge* alone, he being the person in the sole possession of the premises at the time with the knowledge of the plaintiff, who had trusted him only with the possession of his property, and he also being the person ultimately responsible to the other two defendants; and therefore it was said that the money must be taken to have been paid for his use only.

Garrow obtained a rule, calling on the defendants to shew cause why the nonsuit should not be set aside. The action will lie against all the three defendants, inasmuch as they were all responsible to *Welch* for the rent, and this was a compulsory payment on the part of the plaintiff for their default. If one pay a sum of money for another, which that other was compellable to pay, though there be no actual promise to repay it, yet the law raises an assumpsit under such circumstances. Secondly, However the assignment of their interest by two of the defendants to the third might vary the responsibility as amongst themselves, yet such conveyance, to which the plaintiff was no party, cannot be given in evidence as between them and a stranger in order to shift the responsibility from those two to the other.

Erskine shewed cause, and contended that the plaintiff was not entitled to recover, at least in this form of action against these defendants. The action for money paid laid out and expended must be founded upon a contract either express or implied. Now here was no express contract; and none can be implied, because no man can by any voluntary act of his own make another his debtor by paying the debt of that other, without his authority, to a third person. The case is stronger against the plaintiff in the present instance, because he knew at the time he put his carriage on the premises that *Partridge* was in the exclusive possession of them; and therefore he trusted to *Partridge* alone, on whose credit the property was placed in a situation, in which the plaintiff was bound to know that it was liable by law to be taken as a distress for rent, if any were due. When he afterwards paid the rent to *Welch's* attorney, it was for the purpose of redeeming his own goods which he had before entrusted to *Partridge*, and for which *Partridge* alone, and not the other two defendants, was responsible to him; the money therefore was paid for *Partridge's* use, and not for their use. The goods were placed on the premises for the plaintiff's own convenience, and not for the joint benefit of the defendants; two of them had no means of preventing the plaintiff from
doing

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doing so, and as to them the plaintiff attempts consequentially to bind them by a voluntary act of his own, and to raise an implied assumpsit against them. But if that cannot be done directly, it cannot be done in this manner indirectly. At any rate therefore the plaintiff cannot succeed in this form of action: if he can recover at all, it must be by an action on the case.

Garrow and *Espinasse*, in support of the rule, insisted on the grounds before stated.

LORD KENYON Ch. J. Some propositions have been stated on the part of the plaintiff to which I cannot assent. It has been said that, where one person is benefited by the payment of money by another, the law raises an assumpsit against the former: but that I deny; if that were so, and I owed a sum of money to a friend and an enemy chose to pay that debt, the latter might convert himself into my debtor nolens volens. Another proposition was that the assignment from two of the defendants to the third was not evidence against the plaintiff, because he was no party to it: that also I deny; it surely was evidence to shew in what relation the parties stood to this estate. I admit that where one person is surety for another, and compellable to pay the whole debt, and he is called upon to pay, it is money paid to the use of the principal debtor, and may be recovered in an action against him for money paid, even though the surety did not pay the debt by the desire of the principal. But none of those points affect the present question. As the plaintiff put his goods on the premises knowing the interests of the defendants, and thereby placed himself in a situation where he was liable to pay this money without the concurrence of two of the defendants, I thought at the trial that it was money paid to the use of the other defendants only; but on that point I have since doubted, and I rather think that the opinion I gave at the trial was not well founded.

GROSE J. The question is whether the payment made by the plaintiff under these circumstances were such an one from which the law will imply a promise by the three defendants to repay; I think it was. All the three defendants were originally liable to the landlord for the rent; there was an express covenant by all, from which neither of them was released; one of the defendants only being in the occupation of these premises the plaintiff put his goods there, which the landlord distrained for rent, as he had a right to do; then for the purpose of getting back his goods he paid the

rent to the landlord which all the three defendants were bound to pay. The plaintiff could not have relieved himself from the distress without paying the rent; it was not therefore a voluntary, but a compulsory, payment; under these circumstances the law implies a promise by the three defendants to repay the plaintiff. And on this short ground I am of opinion that the action may be maintained.

LAWRENCE J. One of the propositions stated by the plaintiff's counsel certainly cannot be supported, that whoever is benefited by a payment made by another is liable to an action of assumpsit by that other; for one person cannot by a voluntary payment raise an assumpsit against another. But here was a distress for rent due from the three defendants; the notice of distress expressed the rent to be due from them all; the money was paid by the plaintiff in satisfaction of a demand on all, and it was paid by compulsion; therefore I am of opinion that this action may be maintained against the three defendants. The justice of the case indeed is that the one, who must ultimately pay this money, should alone be answerable here: but as all the three defendants were liable to the landlord for the rent in the first instance, and as by this payment made by the plaintiff all the three were released from the demand of the rent, I think that this action may be supported against all of them.

LE BLANC J. Not having been in court when this motion was first made, I have not formed on the sudden a decisive opinion upon this case. But at present the inclination of my opinion is, that this action may be maintained against the three defendants, on this ground; the three defendants were all by their covenant bound to see that the rent was paid; by their default in not seeing that it was paid the plaintiff's goods were distrained for a debt due from the three defendants to *Welch*; by compulsion of law he was obliged to pay that debt; and therefore I think he has his remedy against the three persons who by law were bound to pay, and who did not pay, this money.

Rule absolute.

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doing so, and as to them the plaintiff attempts consequentially to bind them by a voluntary act of his own, and to raise an implied assumpsit against them. But if that cannot be done directly, it cannot be done in this manner indirectly. At any rate therefore the plaintiff cannot succeed in this form of action: if he can recover at all, it must be by an action on the case.

Garrow and *Espinasse*, in support of the rule, insisted on the grounds before stated.

LORD KENYON Ch. J. Some propositions have been stated on the part of the plaintiff to which I cannot assent. It has been said that, where one person is benefited by the payment of money by another, the law raises an assumpsit against the former: but that I deny; if that were so, and I owed a sum of money to a friend and an enemy chose to pay that debt, the latter might convert himself into my debtor nolens volens. Another proposition was that the assignment from two of the defendants to the third was not evidence against the plaintiff, because he was no party to it: that also I deny; it surely was evidence to shew in what relation the parties stood to this estate. I admit that where one person is surety for another, and compellable to pay the whole debt, and he is called upon to pay, it is money paid to the use of the principal debtor, and may be recovered in an action against him for money paid, even though the surety did not pay the debt by the desire of the principal. But none of those points affect the present question. As the plaintiff put his goods on the premises knowing the interests of the defendants, and thereby placed himself in a situation where he was liable to pay this money without the concurrence of two of the defendants, I thought at the trial that it was money paid to the use of the other defendants only; but on that point I have since doubted, and I rather think that the opinion I gave at the trial was not well founded.

GROSE J. The question is whether the payment made by the plaintiff under these circumstances were such an one from which the law will imply a promise by the three defendants to repay; I think it was. All the three defendants were originally liable to the landlord for the rent; there was an express covenant by all, from which neither of them was released; one of the defendants only being in the occupation of these premises the plaintiff put his goods there, which the landlord distrained for rent, as he had a right to do; then for the purpose of getting back his goods he paid the

rent to the landlord which all the three defendants were bound to pay. The plaintiff could not have relieved himself from the distress without paying the rent; it was not therefore a voluntary, but a compulsory, payment; under these circumstances the law implies a promise by the three defendants to repay the plaintiff. And on this short ground I am of opinion that the action may be maintained.

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LAWRENCE J. One of the propositions stated by the plaintiff's counsel certainly cannot be supported, that whoever is benefited by a payment made by another is liable to an action of assumpsit by that other; for one person cannot by a voluntary payment raise an assumpsit against another. But here was a distress for rent due from the three defendants; the notice of distress expressed the rent to be due from them all; the money was paid by the plaintiff in satisfaction of a demand on all, and it was paid by compulsion; therefore I am of opinion that this action may be maintained against the three defendants. The justice of the case indeed is that the one, who must ultimately pay this money, should alone be answerable here: but as all the three defendants were liable to the landlord for the rent in the first instance, and as by this payment made by the plaintiff all the three were released from the demand of the rent, I think that this action may be supported against all of them.

LE BLANC J. Not having been in court when this motion was first made, I have not formed on the sudden a decisive opinion upon this case. But at present the inclination of my opinion is, that this action may be maintained against the three defendants, on this ground; the three defendants were all by their covenant bound to see that the rent was paid; by their default in not seeing that it was paid the plaintiff's goods were distrained for a debt due from the three defendants to *Welch*; by compulsion of law he was obliged to pay that debt; and therefore I think he has his remedy against the three persons who by law were bound to pay, and who did not pay, this money.

Rule absolute.

1799.

Tuesday,
June 11th.

The KING *against* The COMMISSIONERS OF SEWERS
for the Western Division of the County of
Somerset.

If a sea bank
or wall,
which the
owners of
particular
lands are
bound to re-
pair, be de-
stroyed by
tempest,
without any
default in
such owners,
the commis-
sioners of
sewers may
order a new
one (even in
a different
form if ne-
cessary) to be
erected at the
expence of
the whole
level.

THIS was a rule calling on the defendants to shew cause why a writ of certiorari should not issue directed to them, to remove into this court all and singular orders made by them for the erection of a new sea-wall in the parish of *Huntspill*. The order objected to was made by the commissioners at a special session holden on the 22d of *January* last, directing a new sea-wall to be constructed of 486 yards in length in *Huntspill* parish, and ordering a rate to be made on all persons occupying or interested in the lands throughout the level that had been affected by inundations or might be prejudiced by the want of a sufficient sea-wall there.

In the affidavits in support of this rule it was stated that from time immemorial until the same was thrown down a sea-wall stood on the spot and in the line on which the new wall is directed to be built. That the particular persons applying for this rule, having lands in the level, never were, nor were the persons under whom they claim, rated to the repairs of the old sea-wall in the room of which the new sea-wall is ordered to be built; that the level of *Huntspill* never was rated to the repairs of the old sea-wall, but the same was always repaired and rebuilt from time to time as occasion had required by the owners and occupiers of certain particular lands in the level, and that the sea-wall had always been for that purposed marked out and divided into certain distinct allotments corresponding with the number of persons and with the number of distinct portions of land of which they were respectively owners and occupiers and in respect of which they had been used to repair the same. That the old sea-wall was in the course of the last winter thrown down by a storm.

These facts were not questioned on the other side: but it was stated in the affidavits, filed in answer to the rule, that about seven years ago the waves of the sea in the *Bristol* Channel suddenly and unavoidably broke through a neck of land on the western side of the river *Perrot*, (on the eastern side of which the sea-wall in question stands) which has been gradually increasing, through which the sea has for a year and an half entered the river opposite to part of the old sea-wall. That on the 10th of *September* last and for some
time

time before the wall had been in more complete repair than formerly. That on the 11th of *September* a most violent storm arose accompanied by an extraordinary high tide, by which the sea was driven through the new channel directly against the sea-wall with much greater violence than could have happened if the new channel had not been formed. That by force of the waves &c the sea-wall was damaged in an extraordinary manner, it having been in many parts totally broken down and destroyed of the length of twenty feet each; that the waves also broke over other parts of the wall seven or eight feet in height, and drove a boat several hundred yards on the shore. That the formation of the new channel and the damage done to the old wall were inevitable, and could not have been prevented by the persons who had been accustomed to keep the old wall in repair; and that such damage did not happen through their default or neglect. That the new channel is now increased to the breadth of half a mile and the depth of 17 feet, and that ships have lately frequently passed through it. That to prevent the overflowing of the sea, it became absolutely necessary to raise new works of a different and more expensive construction, which cost about 3000*l.*; a sum 30 times as much as would be necessary to rebuild the old wall.

Gibbs and *Dampier* now shewed cause against this rule; and relied on *Callis on Sewers* 146, *Keightley's case*, 10 Co. 139, *a.*, and the case of *The Isle of Ely*, 10 Co. 141., to shew that if the banks be destroyed by any extraordinary tide or by tempest without any default in the party, who was bound to repair them, the expence of repairing must be borne by the level. In *Callis* 146 it is said "If the sea at the spring tides, or at extraordinary casual swelling tides or floods, have broke down the fences and overthrown the banks, and drowned the country, without any default in the party who was tied to have repaired the same, the level shall in this case make up the breach; for things which happen extraordinarily by the sea or great waters, which neither policy of man could prevent nor industry or force could resist, are counted inevitable." They also referred to *Callis* 104, to shew that if an old wall or bank be thrown down by tempest, the commissioners may order another to be erected, even in a different form if necessary.

Burrough, who was to have argued in support of the rule, admitted that the authorities referred to were decisive against him.

Lord KENYON Ch. J. To be sure the law is so; and therefore we ought not to grant a certiorari to remove the proceedings below.

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below. The preponderance must be very strong against the propriety of an order of commissioners of sewers to induce us to remove it here. It has been frequently said that no certiorari ought to be granted to remove a poor rate, lest the poor starve in the mean time. There is almost as strong a reason against removing such an order as the present, lest in the mean time the whole country be inundated.

Per Curiam.

Rule discharged.

Tuesday,
June 11th.

The KING against BENJAMIN FLOWER.

The House of Lords having voted the defendant guilty of a breach of privilege in publishing a libel upon a member of their House, and having sentenced him to pay a fine of 100*l.* and to be imprisoned six months and until such fine was paid, which commitment was returned into this court upon a habeas corpus sued out by the defendant, the Court refused to discharge him out of custody.

THE defendant was this day brought before the Court by virtue of a writ of habeas corpus directed to the keeper of Newgate, who returned the following warrant of commitment by the House of Lords as the cause of the defendant's imprisonment. "*Die Veneris 3^o Maij, 1799.* The Serjeant at Arms acquainted the House that *Benjamin Flower* had surrendered himself and was in his custody; whereupon he was ordered to be brought to the bar, and being brought to the bar accordingly, he was informed of the complaint made against him of his having printed and published a libel upon the Right Reverend *Richard* Lord Bishop of *Landaff* a member of this House in the paper intitled "*The Cambridge Intelligencer*" *Saturday April 20th, 1799*; and the said paper was shewn to him; and the said *Benjamin Flower* having been heard as to what he had to say in answer to the said complaint, and having acknowledged himself to be the printer and publisher of the said paper so complained of, and also that he was the sole proprietor of the same, he was directed to withdraw: then the same paper was again read; moved to resolve by the Lords spiritual and temporal in parliament assembled that *Benjamin Flower* of *Cambridge* printer having presumed to publish a libel on the Right Reverend *Richard* Lord Bishop of *Landaff* a member of this House in the paper intitled "*The Cambridge Intelligencer*" *Saturday April 20th 1799*, is guilty of a high breach of the privileges of this House; which being objected to, after debate, the question was put thereupon, it was resolved in the affirmative; moved to resolve by the Lords spiritual and temporal in parliament assembled that *Benjamin Flower* of *Cambridge* printer do for his said offence pay a fine to his Majesty of 100*l.*, and that he be committed pri-

soner to *Newgate* for the space of six months, and until he pay the said fine; the question was put thereupon; it was resolved in the affirmative. Ordered that the Serjeant at Arms attending this House his deputy or deputies do forthwith convey the body of the said *Benjamin Flower* to the prison of *Newgate* to be kept in safe custody for the space of six months and until he pay the said fine.

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Clifford moved that the defendant might be discharged, on the ground of the illegality of the warrant of commitment in several respects. First, The House of Lords have no jurisdiction to imprison any one beyond the term of their session: whereas this commitment is for six months absolutely, which may extend beyond that term. Secondly, They have no power to fine. Thirdly, They have no power to punish either by fine or imprisonment any commoner, not an officer of their House, for any contempt committed out of the House, such offence being triable by the Courts of common law. First; Mr. Justice *Blackstone* in his chapter upon commitment and bail (*a*) lays down the position generally, that this Court has power to bail in all cases, except cases of imprisonment by either House of Parliament so long as the session lasts. This necessarily excludes the idea of either House having power to imprison beyond that period. In *Fitton's* case (*b*), which was the subject of much controversy in the House of Commons respecting the jurisdiction of the House of Lords to fine and imprison by their own authority in a similar case of libelling a peer, Mr. Solicitor-General *Finch* (afterwards Lord *Nottingham*) denied the power of the Lords to imprison in any case beyond the session. If the line be not drawn there, an imprisonment under the order of the House of Lords may be extended to an indefinite length of time (*c*), unless this Court interfered. And the same objection would apply to this power as was formerly

(*a*) 4 *Blac. Com.* 299, 300.

(*b*) Vid. *Hargrave's* Preface to Lord *Hale's Treatise on the Jurisdiction of the Lords' House of Parliament*, 99 &c. 108 &c. Vid. Mr. *Offley's* speech in 1 *Grey's Parl. Debates* 103. "The Court (says he, speaking of the incongruity of contending for the power of the House of Lords to imprison beyond the session in any case) "to die, and yet the contempt to last longer than their

"Lordships last," &c. This speech is introduced by Mr. *Grey* with an observation that the arguments used by Mr. *Offley* were the same as had formerly been used by the Solicitor-General *Finch* on the same occasion.

(*c*) Vid. Lord *Danby's* case, 2 *St. Tr.* 759, who being left in custody after the session was bailed by *B. R.* to appear in the House of Lords in the next session of Parliament.

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urged by Lord *Coke* to the indefinite power of the crown to commit by it's own authority. *Vid.* 8 *Parliam. Hist.* 61. It is of great importance to the subject that when the House of Lords exceed their jurisdiction by an illegal commitment this Court should have the power of correcting it by releasing the individual, otherwise there must be a failure of justice. But no permanent mischief can ensue from the exercise of such a power by the judges of the courts of common law, because in case of their exceeding their authority they are punishable by impeachment. Secondly, As to the power of the Lord's House to fine; Lord *Coke* (a) in the first conference between the two Houses on the petition of right said that the King could only fine by his judges in curiâ, and not in camerâ, which excludes any power of fining in any other body. Such a power could only be derived from the crown; and it appears fully throughout Lord *Hale's Treatise on the Jurisdiction of the House* (b) of Lords, and *Petyt's Jus Parliamentarium*, that the House of Lords of themselves were never invested with such a juridical power: coram Rege et consilio and coram Rege in Parlamento were expressions denoting the power of the crown exercised through the medium of the council at the House of Lords in contradistinction to the same power exercised through the medium of the Courts of Law. Neither can such a power of fining exist with the now acknowledged principle of the constitution, that the House of Lords have no *original* jurisdiction either civil or criminal, and there can be no power of fining except by a Court of Record (c): whereas the proceeding in question is by the Lords in their legislative, and not in their judicial, capacity; for their judicial capacity is confined to cases of error from other courts. In the case of the *King v. The Countess of Arundel* (d), the Journals of the House of Lords are said to be no records; and yet the entry on the Journals can be the only authority for levying the fine on the defendant. Neither does there appear any reason why the Lords' House should exercise the power of fining any more than the House of Commons, who do not pretend to any such authority (e). Thirdly, Admitting the power of the Lords as a House of Parliament to commit for contempts commit-

(a) *Vid.* 7th vol. *Parliamentary History*, 421.

(b) *Vid.* Chap. 1, 2, 3, 4, and 5.

(c) *Griesley's case*, 8 *Rep.* 38, b. *Beecher's case*, *ib.* 60, b; *Dr. Benham's case*, *ib.* 120.

Godfrey's case 11 *Rep.* 438b; *Groenvelt v. Burawell*, *Salk.* 200.

(d) *Hob.* 110.

(e) *Vid.* *Hargrave's Preface* 36.

ted in their presence or for offences committed by their own members or officers, as such, yet they have no power to punish a commoner for a common law offence. Here the commitment is not stated to be for a contempt or breach of privilege generally, but specially for a libel upon the Bishop of *Landaff*, a member of the House. So far back as the 4th year of *Edward III.* the House of Peers having sat in judgment upon certain persons, Peers and Commoners, for the murder of *Edward* the Second, with respect to the latter the House entered a solemn protest upon the roll that it should not be drawn into a precedent in future; it being stated to be against the law of the land that they should adjudge any others than their Peers. Lord *Hale* (a) in his comment thereon concludes to the same effect, and observes that though the case then before them was a judgment of death, yet the tenor of the declaration made by the House is general. The above entry on the Rolls of Parliament has by many been considered as having the authority of a statute (b); and it was so declared by the Judges on a question put to them by the House of Lords on the impeachment of Sir *A. Blair* and others in 1689 (c). But the same principle has been abundantly recognised in various acts of Parliament; 9 *Hen. 3. st. 1. c. 29.* 5 *Ed. 3. c. 9.* 25 *Ed. 3. st. 5. c. 4.* 28 *Ed. 3. c. 3.* and 42 *Ed. 3. c. 3.* which are referred to in the petition of right, 3 *Car. 1.* The result of all these is that no person shall be attached by his person or disseised of his property but by the judgment of his Peers, *the law of the land, or by due process of law.* Now the phrase of “per legem terræ” in *Magna Charta* was explained by the Judges in the case of *Bridgman v. Holt* (d) to refer only to such cases as are not triable “per judicium parium.” The 1 *Hen. 4. c. 14.*, which took away appeals of treason and misdemeanors in Parliament at the suit of private persons, must be taken in a more enlarged sense than what is now understood by “appeals;” for at that time the House of Lords claimed original cognizance of all cases; and in Lord *Clarendon’s* case (e) the word *appeal* in that statute is stated to mean the same as *accusation*, from the *French* word *appeller*. Some instances occurred previous to the Revolution, where the Lords having exercised the power of trying Commoners for offences cog-

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FLOWER.(a) Vid. *Hale’s Jurisdiction of the House of Lords* 91.(b) 2 *Inst.* 50. *Cotton’s Akr.* 7. *Shew. P. C.* 125.

(c) 14 vol. of the Lords’ Journals 264.

(d) Vid. *Shew. P. C.* 124., and *Hargrave’s Preface* 184. 187.(e) 2 *State Trials* 556.

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nizable by the Courts of common law, their jurisdiction was resisted by the House of Commons, and the Lords submitted. In the year 1667 Mr. *Fitton* (a), having been proceeded against before the Lords for a libel on the Lord *Gerard*, was on the ground of breach of privilege fined 500*l.* and ordered to be imprisoned till he should produce one *Granger*, whose name was to the libel, and was also bound to find sureties for his life: whereupon he petitioned the House of Commons for redress, who, upon the report of a committee to whom the matter was referred that the question of jurisdiction was fit to be argued at the bar of the House, appointed a day accordingly, and at the same time appointed a committee (amongst whom were the Solicitor-General *Finch*, Serjeant *Maynard*, Mr. *Vaughan*, and Mr. *Prynne*.) to inquire into the precedents: but it does not appear what the House finally did upon the matter. The same question however arose very soon after in the case of *Skinner v. The East India Company* (b). It is true that in its inception was an attempt in the House of Lords to exercise original jurisdiction in a *civil* case, and to give damages by their own authority to the party grieved: but incidentally their criminal jurisdiction came into question. For the Lords having adjudged the *East India Company* to pay 5000*l.* as a compensation to *Skinner* for the injury to his property complained of, the Company presented a petition to the Commons complaining of the proceedings of the Lords; which petition being acknowledged by Sir *Samuel Barnardiston*, the Deputy Governor, and others, the Commons appointed a committee of examination composed of Mr. Solicitor-General *Finch* and all the gentlemen of the long robe, who reported three strong resolutions against the jurisdiction of the Lords; and the same was also denied in the debate by Serjeant *Maynard*, Sir *Robert Atkins*, Sir *Robert Thurland*, afterwards a Baron of the Exchequer, and Mr. *Vaughan*, afterwards the Lord Chief Justice of *C. P.*: whereupon the Commons committed *Skinner* for a breach of privilege; and afterwards declared that whoever should be aiding in the execution of the order of the Lords should be deemed a betrayer of the rights and liberties of the Commons of *England*, and an infringer of the privileges of the House of Commons. In return the Lords voted the petition of Sir *John Barnardiston* a breach of privilege, and or-

(a) Vid. *Hargrave's Preface* 99. (b) *Ib.* 103.

dered him to pay a fine of 300*l.*, and to be imprisoned till it was paid. The Parliament was immediately adjourned by order of the King, and before their next meeting it appeared that an entry had been made in the office of the auditor of the receipt of the Exchequer as if the fine had been paid by Sir *John Barnardiston*, which gave an appearance of submission to the sentence of the Lords; but on the next meeting of the Commons, they examined Sir *Samuel*, and discovered that the whole was a contrivance, he having been liberated without payment of the fine. This shews that the House of Lords were conscious of the illegality of their proceedings, and that they had not the power which they assumed, but wished to lay a foundation for claiming it in future by procuring a false entry to be made of the payment of the fine. The dispute was then put a stop to by the King's prorogation; and finally both Houses agreed to expunge from their Journals all matters relating to the business between *Skinner* and the *East India* Company, so that in the result the Lords abandoned their pretensions. There was another instance in 1676 where the House of Lords fined Dr. *Carey* (a) 1000*l.*, and committed him till payment, for a contempt in not answering before them as to his knowledge of the writer of a certain pamphlet respecting the long prorogation of the Parliament operating as a dissolution of it. The matter was taken up in the House of Commons, but finally went off under the idea of obtaining better information. The true reason however seems to have been that the Commons having so lately promised the King to end the dispute with the Lords on the subject of their jurisdiction were unwilling to take it up again in the instance of a man, whose offence was as much a libel upon themselves as on the other House of Parliament. Nothing therefore can be concluded from this. (He also referred to the fourth resolution of the Lords in 1628, relative to the petition of right. Lords' Journals 25th *April* 1628.) Thus the question stood before the Revolution: but for a long period after that event the practice of the House of Lords affords the strongest argument to shew what was deemed to be the legal and regular course of proceeding in these cases. The first case which occurred was on the publication of a libel on the Trinity, which the Lords (b) on 3d *January* 1693 voted should be burned by the common hangman,

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(a) Vid. *Hargrave's Preface* 161. and 4 |
Grey's Parl. Deb. 165 to 173.

(b) 15 vol. Lords' Journals 332.

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and ordered that the Attorney-General should prosecute the author according to law. Next came the case of *Bridgman v. Holt*(a), where upon a trial at bar in the Court of King's Bench the judges refused to seal a bill of exceptions under some objection to the correctness of the statement in point of fact; on which a petition was presented to the Lords in 1693, complaining of the Judges in that respect: the Judges put in an answer objecting to the Lords taking cognizance of the complaint as being in the nature of an original suit, charging them with a crime, *and so altogether improper for the examination of the Lords, as not being any more triable by them than every information for breach of any statute law; which matters are by the common law and justice of the land of common right to be tried by a jury.* After argument for several days at the bar of the House the result was that the parties complaining had leave to withdraw their petition. This was in effect a complete abandonment of that claim of jurisdiction by the Lords. On the authority of that precedent the Lords continued to act down to 1764., of which several instances occur in their Journals. In 1702 (b) Dr. Drake's "*History of the last Parliament*" was voted a libel, and the Attorney-General ordered to prosecute the author. In 1707 (c) "*Remarks on Dr. Friend's Account of Lord Peterborough's Conduct in Spain*" &c., published by Mr. Kingston, was voted a libel, and the Attorney-General ordered to prosecute the publisher; but Kingston himself was discharged by the Lords. In 1719 (d) Hall's "*Sober Reply*" &c. was voted blasphemous, and ordered to be burned by the common hangman, and the Attorney-General ordered to prosecute; but the author was afterwards discharged on entering into recognizance to appear in the Court of King's Bench the first day of the next term to answer such information as might be exhibited against him. In 1720 (e) a paper was voted a libel on the poor Protestants in the *Palatinate* and upon the conduct of his Majesty and the other Protestant powers in their favour; on which it was ordered that the King be addressed to direct a prosecution against the author printer and publisher. In 1740 a motion having been made in the House of Lords to remove Sir Robert Walpole from his office, which was negatived, the House resolved that any attempt to punish an in-

(a) Vid Hargrave's Preface 184.

(b) 17 vol. of Lords' Journals 122, 3.

(c) *Ib.* 18 vol. 430.

(d) *Ib.* 21 vol. 231, 242.

(e) *Ib.* 344.

dividual without hearing him in his defence &c. was against the law of Parliament &c.; and though a protest signed by thirty-one Lords was entered to that resolution, yet they did not deny the truth of the proposition, but only the application of it (a). In 1750 (b) the House voted a paper intitled "*Constitutional Queries*" &c. to be a libel on the King laws and constitution, and after a conference with the Commons on the subject addressed the King to give orders for discovering the author and publisher, and bringing them to condign punishment. In 1763 (c) "*The Essay on Woman*," which was published with the name of Dr. Warburton, a member of the House, affixed, was voted a libel and a breach of privilege; yet after receiving proof that Mr. Wilkes was the author, the Lords only addressed the King to direct a prosecution. That case is in all respects like the present. In the same year (d) "*The North-Briton*, No. 45," another publication of Mr. Wilkes, was voted a libel by the Lords, and on a conference between the two Houses, the result was to order it to be burned, and to address the King to direct a prosecution against the author. A similar proceeding took place in 1764. As to all the cases since that period where the House of Lords have exercised the jurisdiction now complained of, they have been cases submitted to by the parties, and are not therefore entitled to the same weight as those cases where the parties having resisted the House have acquiesced. It is true that for contempts committed before either House of Parliament, or by its members or officers, as such, they have a power of committing, as was said by Lord Chief Justice De Grey in *Brafs Crosby's* case (e), the reason of which is there truly given by him, that contempts can only be punished by the Court or jurisdiction before which they are committed, or by some superior Court; and therefore as there is no Court superior to the Houses of Parliament, it follows that in order to protect their authority they must have the power to commit in such cases. But that does not apply to a case like the present, where it appears upon the face of the warrant returned that the party was committed for a common law offence, for which he is punishable by the ordinary Courts. In the act of the 16 Car. 1. c. 10., for abolishing the Court of Star-chamber, one of the reasons stated

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(a) Vid. Commons Journ. 13th Feb. 1740, and 3 vol. of the Collection of King's Speeches and Lords' Protests, p. 385.

(b) 27 vol. 478.

(c) 30 vol. 415, 420.

(d) *Ib.* 425.

(e) 3 *Wils.* 198.

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is that all matters examinable before them may have their proper remedy and redress and their due punishment and correction by the common law of the land, and in the ordinary course of justice elsewhere. In Lord *Shaftesbury's* case^(a) it was taken for granted that the House of Lords could not commit even one of their own members for a contempt committed out of the House; and that case was distinguished from others, because he was a member, and the contempt was committed in the face of the House. It is not enough in this case for the Court to refuse to give relief merely because the House have voted this a breach of privilege; for if that were so, they might extend their jurisdiction over every offence by voting it a breach of privilege. And in 1704, pending the proceedings in Parliament on the case of *Ashby v. White*, the Lords came to a resolution^(b) that neither House of Parliament had a power to create new privileges to themselves not warranted by the known laws and customs of Parliament. Now here is an attempt to convert a common law offence into a breach of privilege. If this were to prevail, great injustice might ensue; for the punishment inflicted by the House will be no bar to a prosecution for the same offence at common law; and thus the defendant may be punished twice for the same offence, which is contrary to law and justice and the principles of the constitution. Or it may happen that on a trial upon an information or indictment for the same offence the defendant may be acquitted by a jury of the country; and thus there would be two contradictory judgments on the same subject; or if convicted and the record removed by error into the Upper House, the same jurisdiction by which the defendant had been before punished would have either to pronounce a contradictory judgment by declaring that the same writing set out on the record was no libel which they had before adjudged to be a libel, or they would have to confirm the conviction and judgment, and thus by their own authority adjudge the defendant to suffer a second punishment for the same offence; in either event the appeal would be to the same Court of error which had prejudged the cause, a thing unheard-of in our jurisprudence. The mode of proceeding also in this summary manner is highly unjust: the defendant had no opportunity of making his full defence to the charge, or of calling any witnesses in that behalf; but on the mere acknowledgment by him that he was the

^(a) 2 *St. Tr.* 615. ^(b) 17 vol. of Lords' Journals 698 &c. 703.

printer and publisher of the newspaper, in which the paragraph complained of was contained, he was convicted of the whole charge: whereas the mere printing or publishing a paper does not subject the party to conviction and punishment, as for publishing a libel, unless it be found that he published it with a libellous intent, a fact peculiarly proper for the decision of a jury.

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Lord KENYON Ch. J. If we entertained any doubts on this subject, it would be unbecoming in us to rush to a speedy decision without looking through all the cases cited by the defendant's counsel: but not having any doubts, I think it best to dispose of the case at once. The cases that have been referred to are all collected in Lord Hale's *Treatise on the Jurisdiction of the Lords' House of Parliament* and that valuable preface to it published by Mr. Hargrave: but in the whole of that publication the defendant's counsel has not found one case applicable to the present. This is one of the plainest questions that ever was discussed in a court of law. Some things however have dropped from the learned counsel that require an answer. First, it is said that the House of Lords is not a court of record: that the House of Lords when exercising a legislative capacity is not a court of record is undoubtedly true, but when sitting in a judicial capacity, as in the present case, it is a court of record. Then it was objected that the defendant was condemned without being heard in his defence: but the warrant of commitment furnishes an answer to that; by that it appears that "he was informed of the complaint made against him &c," and *having been heard* as to what he had to say in answer to the said complaint" &c. he was adjudged "guilty of a high breach of the privileges of the House" &c. So that it clearly appears that he was heard in his defence, and had the same opportunity of calling witnesses that every other defendant has in a court of justice. Then insinuations are thrown out against the encroachments by the House of Lords on the liberties of the subject: but the good subjects of this country feel themselves protected in their liberties by both Houses of Parliament. Government rests in a great degree on public opinion; and if ever the time shall come when factious men will overturn the government of the country, they will begin their work by calumniating the courts of justice and both Houses of Parliament. The ground of this proceeding is that the defendant has been guilty of a breach of privileges of the House, and a contempt of the House. This claim of right to punish by fine and imprisonment for such an offence is not peculiar to the House of Lords; it is frequently exercised by this and other courts of record, and that not merely for contempts

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committed in the presence of the Court; one instance of which was that of Mr. *Beardmore* (a), under-sheriff of *Middlesex*, for a contempt of the Court in not executing part of the sentence pronounced on Dr. *Shebbeare*. And that case answers another objection, strongly insisted upon by the defendant's counsel here, that if the party accused can be punished in any other manner this mode of trial and punishment cannot be resorted to; for there Mr. *Beardmore* might have been indicted, but yet he was attached, examined upon interrogatories, and fined and imprisoned. Again, it is objected that the House of Lords cannot impose a fine for such an offence: but this and other courts of record have the power of fining in this summary manner; and why should not the House of Lords have the same power of imposing a fine for a contempt of their privileges? Then several instances were alluded to, where the House did not choose to exercise this privilege, but directed prosecutions to be instituted in the courts of law: the same observation might equally be made on the proceedings of this Court, who have sometimes directed indictments to be preferred: we are not therefore to conclude that the House of Lords has not the power of inflicting this punishment from the circumstance of its not exercising it on all occasions. When Lord *Shaftebury's* case came on there were some persons who wished to abridge the privileges of the House of Lords: but Mr. Serjt. *Maynard* was one of those who argued in support of their privileges, and he surely was not capable of concurring in any attempt to infringe the liberties of the people. It has been said however that though many instances are to be found in which the House of Lords has in point of fact exercised this power, whenever that power has been resisted it has been resisted with effect; from whence it is inferred that the House of Lords has not the authority which it assumes: but in this case I may avail myself of the same argument in favor of its jurisdiction, for no case has been found where it has been holden to be illegal in the House of Lords to fine and imprison a person guilty of a breach of privilege. We were bound to grant this habeas corpus: but having seen the return to it, we are bound to remand the defendant to prison, because the subject belongs ad aliud examen. There is nothing unconstitutional in the House of Lords proceeding in this mode for a breach of privilege, and unless we wish to assist in the attempt that is made to upset the law of parliament and the constitution, we must remand the defendant.

(a) Vid: 2 Burr. 792.

GROSE J. This question is not new; it has frequently been considered in courts of law, and the principles discussed to-day and the cases cited were examined not many years, and the result is very ably stated by Lord Ch. Just. *De Grey* in 3 *Wils.* 199. "When the House of Commons (and the same may be said of the House of Lords) adjudge any thing to be a contempt or a breach of privilege, their adjudication is a conviction, and their commitment in consequence is execution; and no Court can discharge or bail a person that is in execution by the judgment of any other Court"; In another passage he said "Every Court must be sole judge of its own contempts"; and again "The counsel at the bar have not cited one case where any Court of this Hall ever determined a matter of privilege which did not come incidentally before them". Having stated this, I think I need not add more in the present case.

Per Curiam (a),

Let the defendant be remanded.

(a) Mr. J. *Lawrence* was not in court, being indisposed; and Mr. J. *Le Blanc* having attended at the Guildhall sittings for

Lord *Kenyon*, and not returning until the argument was closed, gave no opinion.

1799.
The KING
against
FLOWER.

LEPINE and Two Others Executors of LEPINE against
BAYLEY.

Wednesday,
June 12th.

THE defendant being brought up to be discharged under the Lords' act, a promisory note for the daily payment of 6*d.* was offered to him signed by *Bartholomy* only one of the plaintiffs, and not expressed to be signed for himself and the other executors. This note was objected to as insufficient, because not signed by all the plaintiffs, the statute requiring the creditor or creditors (as the case may be) to give a note signed with his or their name or names &c. The case of *Rex on the prosecution of Moor and others v. Wilkinson* (a) was relied on, where it was holden that a similar note signed only by one of several lessors of the plaintiff was bad. And the counsel observed that the statute meant that the insolvent debtor should have the security of all the persons at whose suit he is detained in custody.

When several executors are plaintiffs, a note given to an insolvent debtor under the Lords' act must be signed by all of them.

In answer, it was said that the case referred to was an action for a tort, where one plaintiff could not sign for the others: but that

(a) *Ante*, 7 vol. 156.

1799.

LEPINE
against
BAYLEY.

in a subsequent case, *Meux and others v. Humphry* (b) where the action was on promises, and one plaintiff gave a note signed for himself and his partners, it was holden sufficient.

LE BLANC J. (The rest of the Court not having yet arrived) thought that the note was *sufficient*; for that a defendant had a right under the statute to the security of all the plaintiffs personally. That this note signed by one executor only would not bind the other executors, nor would it be a charge on the assets of the testator; and that therefore all the executors should have signed it.

The other Judges, when the case was mentioned to them on their coming into court, agreed to this opinion, and the defendant was discharged.

Gurney for the plaintiffs.

Manley for the defendant.

(a) *Ante* 25.

Wednesday,
June 12th.

BERTHEN *against* STREET:

The Court referred it to the Master to compute what was due for principal and interest on a mortgage, in an action of covenant.

A RULE having been obtained, calling on the defendant to shew cause why it should not be referred to the Master to ascertain what was due for principal and interest upon a mortgage secured by covenant, on which this action was brought,

Garrow now shewed cause against it. First, he said, the Court had never yet gone the length of granting the rule, prayed in covenant for payment of money; and further that the defendant had filed a bill in equity praying an account, which cause was still pending.

Bayley Serjt. in support of the rule, contended that this case did not differ in principle from those on bills of exchange and promissory notes; and that it never was considered an answer to similar applications in those cases that a suit in Chancery was depending.

The Court were of that opinion, and made the rule absolute.

GROSE J. said he had looked into the cases (a) mentioned when the rule was moved, and thought the motion a very proper one.

Rule absolute.

(a) *Heldipp v. Otway*, 2 Saund. 106; and *Theluffon v. Fletcher*, per Buller J. Doug. 316.

END OF TRINITY TERM.

C A S E S

1799.

ARGUED and DETERMINED

IN THE

Court of KING'S BENCH,

IN

Michaelmas Term,

In the Fortieth Year of the Reign of GEORGE III.

BULL *against* SIBBS.

Friday,
Nov. 8th.

ON the trial of this action for the use and occupation of lands for nine years at the last assizes at *Norwich* before Mr. Serjt. *Marshall*, the case appeared to be thus.

The defendant had not in fact occupied the land himself, but there was evidence to go to the jury from which they might infer that there had been an agreement between the plaintiff and the defendant by which the latter was to take the land in question. It also appeared that the defendant wished to receive rent for it of one *Ditchell*, who had been in the actual possession, though he (the defendant) had not in fact received any such rent. On the part of the defendant it was objected that the present action was misconceived; that the action, if brought at all against the defendant, should have been brought on the agreement; and that the defendant was not liable under the statute 11 *Geo. 2. c. 19.*, which gives a plaintiff a right "to recover a reasonable satisfaction for the lands &c *held or occupied* by the defendant in an action on the case for the use and occupation" &c, the defendant never having in fact held or occupied the lands in question. A verdict

If *A.* agree to let lands to *B.*, who permits *C.* to occupy them, *A.* may recover the rent in an action against *B.* for use and occupation.

1799.

BULL
against
SIBBS.

however was found for the plaintiff for 180*l.*, nine years' rent at 20*l.* *per annum*, the jury being of opinion on the evidence given that there had been such an agreement between the plaintiff and the defendant as is before stated, and that *Ditchell* had occupied as tenant to the defendant.

Wilson, who now moved to set aside that verdict and to enter a nonsuit, again stated the objection; and, after observing that this precise point had never been decided, referred to what was said by *Eyre* Ch. J. in delivering the opinion of the Court in *Naisb v. Tatlock* (a), "The statute meant to provide an easy remedy in the simple case of actual occupation, leaving the other more complicated cases to their ordinary remedy." But

The Court said that, if *Ditchell* occupied the land under the defendant, the latter was answerable to the plaintiff in this form of action. That an occupation by the tenant of the defendant was, as far as respected the plaintiff, an occupation by the defendant himself. That it need not be stated in the declaration that *Ditchell* held and occupied at the instance and request of the defendant, it being sufficient to declare on the legal operation of an agreement. That, where goods sold are by order of the vendee delivered to a third person, an action may be maintained on the common count as for goods sold and delivered to the vendee himself, though in practice it is generally stated that the goods were delivered to such third party at the request of the vendee. That as to the other questions, whether or not there had been an agreement between the plaintiff and the defendant, and how far *Ditchell* occupied under an agreement with the defendant, they were questions proper for the consideration of the jury.

And the rule was refused.

(a) 2 H. Bl. Rep. 325.

Friday,
Nov. 8th.

POOLE *against* CABANES and Others.

If the consideration for granting an annuity be paid by a banker's

check, it is necessary to state the particulars of that check in the memorial.

If the grantor of an annuity pay it without objection during the life-time of the person who negotiated the business for the grantee, the Court will not permit the grantor to apply to set aside the annuity deeds on a representation of facts that could only have been answered by such agent for the grantee.

It

THIS was a rule calling on the plaintiff to shew cause why the bond and warrant of attorney, given by the defendants to secure an annuity, should not be delivered up to be cancelled.

It appeared by the affidavits made in support of the rule that about the middle of the month of *February* 1792 the defendants applied to *J. Harvey* in consequence of an advertisement, and having agreed with him to grant an annuity of 30*l.* for three lives in consideration of 210*l.* they executed a bond on the 27th of *February* for the purpose of securing the annuity, and a warrant of attorney to confess judgment on it; that *Poole* did not attend any of the meetings during the negotiation; that until the 27th of *February* his name was not even mentioned to them; and that they believed that *Harvey* was the person who really purchased the annuity. That at the time when the bond and warrant of attorney were executed *Harvey* in his own name drew and gave them a check upon *Lockhart* and Co. bankers in *Pall-Mall* for 199*l.* 10*s.* part of the consideration, which draft was duly honoured: that *Harvey* at the same time took out ten guineas to make up the remainder of the purchase-money, saying it was necessary that all the money should be *produced*, but that he immediately put it again into his own pocket; and that they never received any other consideration for the annuity than the sum of 199*l.* 10*s.* upon *Harvey's* draft. In the memorial it was stated that the consideration of granting the annuity "was 210*l.*, which was paid by *Poole* to the defendants, as follows, 199*l.* 10*s.*—by a draft of *J. Harvey* on Messrs *Lockbarts* bankers in *Pall-Mall*, which said draft was duly honoured, and the remainder, the sum of 10*l.* 10*s.*,—by *Poole* to the defendants in lawful money &c."

Several objections were taken, in support of the rule; 1st, That it was stated in the memorial that the money was paid by *Poole* to the defendants, whereas, if it were paid by any one, it was paid by *Harvey* as an agent for *Poole*; *Dalmer v. Barnard*, ante, 7 vol. 248. 2dly, That the whole consideration-money mentioned in the memorial was not paid, ten guineas having been deducted by *Harvey*; 3dly, That the consideration was not sufficiently stated in the memorial.

Gibbs, in shewing cause against this rule, produced an affidavit, in which it was stated that the annuity had been regularly paid from the year 1792 when it was granted until *Harvey's* death in *December* last; and then insisted that it ought not to be permitted to the defendants, who had lain by during the whole of *Harvey's* life-time, to make these objections to the annuity when the only person, who could answer the facts related in the defendants' affidavits, was dead.

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POOLE
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The

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CABANES.

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Lawes, in support of it, observed that the last objection appeared on the memorial itself, where it was stated that part of the money was paid by a banker's check without setting forth the time when the check was payable; and for this purpose he relied on the case of *Berry v. Bentley*, ante, 6 vol. 690 (a), where this objection was holden to be fatal.

Gibbs then said that in that case the money was paid by a promisory note, whereas here it was paid by a banker's check, which is always considered as money. But

The Court thought that that was immaterial, and that this case could not be distinguished on principle from that of *Berry v. Bentley*, which ought therefore to govern the decision in the present case. And for this last objection the rule was made absolute; the defendants agreeing to return the principal, on taking an account before the Master.

(a) See also *Rumball v. Murray*, ante, 3 vol. 299.

Monday,
Nov. 11th.

DAWES against PECK.

If the consignors of goods deliver them to a particular carrier by order of the consignee, and they be afterwards lost, the consignors cannot maintain an action against the carrier for the loss, although he paid for booking the goods.
—The action can only be brought by the consignee.

THIS was an action on the case by the consignor of goods against the defendant, a common carrier, for not safely carrying, according to his undertaking in consideration of a certain hire and reward to be therefore paid, two casks of gin from *London* to one *Thomas Odey* at *Hillmorton* in *Warwickshire* within the time limited by two excise permits, in consequence of which the casks of gin became forfeited to the Crown and were seized. This case came on to be tried at the sittings in *London* after last *Easter* term, when the plaintiff proved his case by shewing the delivery of the casks to a person employed by the defendant at the usual place, where they were booked to be sent by the defendant's waggon and the usual price paid for booking by the plaintiff's servant. The casks were directed to "Mr. *Odey Hillmorton* near *Rugby Warwickshire* by *Peck's* waggon." It appeared that they were afterwards sent by the waggon, and were left at the *Crown Inn* at *West Haddon*, which was the nearest place to *Hillmorton* in the road which the waggon travelled; and where, after laying some time, they were seized in consequence of the time mentioned in the permit for their removal

being expired. The merits of the case as between the plaintiff and *Odey* the consignee, or in respect of the legality of the seizure, were not entered into: but the defendant's counsel in opening his case to the jury read a letter from the plaintiff to *Odey*, after the seizure was known, in which he said that the liquors sent "were in quantity and prices exactly conformable to your (*Odey's*) order: but by what authority they were ever left at the *Crown Inn* at *West Haddon* remains for the innkeeper or the carrier to explain or account for. All I have to observe is this, that the goods *having been sent conformably to your orders and by the carrier you directed*, I shall certainly look to you for their amount" &c. Upon reading this letter, which was admitted to be genuine, Lord *Kenyon* was of opinion that the action by the present plaintiff could not be supported; for that the legal right to the goods after such delivery was vested in the consignee, to whom alone the carrier was answerable, if at all; and therefore the plaintiff was nonsuited.

A new trial was moved for in *Trinity* term last, and a rule nisi for setting aside the nonsuit was obtained, which stood over till this term. And now

Erskine and *Raine* shewed cause against the rule. A delivery of goods to a carrier *named by the consignee*, as in this case, is tantamount to a delivery to the consignee himself, and divests the consignor of the legal property in them, though he still retains an equitable right of stopping them while in transitu in case of the failure of the consignee. After such a delivery the property in these goods was altered, and the goods were at the risk of the consignee; and so it was considered by the plaintiff himself, as appears by his letter to *Odey*; consequently the plaintiff can maintain no action for any loss or injury which happened to them after they became the property of another. In the cases of *Davis v. James* (a), and *Moore v. Wilson* (b), the ground of the decisions, that the consignors might maintain the action, was that they had made themselves responsible to the carriers for the price of the carriage. In the former of those Lord *Mansfield* said, that there was no question in the case as to the vesting of the property; for the action was founded on the agreement between the carrier and the plaintiffs who were to pay him. But there is nothing in this case from which any property in the plaintiff can be inferred

1799.

DAWES
against
PECK.

(a) 5 Burr. 2680.

(b) *Ante*, 1 vol. 659.

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against
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DAWES
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(a) 5 Burr. 2680.

(b) *Ante*, 1 vol. 659.

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whereon to found his action; because his own letter shews that he had renounced all property in the goods.

Garrow and Yates contra. It does not follow that, because the consignee may maintain an action against a carrier for the loss of goods, the consignor may not also have his remedy. The cases shew that the action may be maintained by either. The reason of the thing is more in favour of the action by the consignor, for there is a privity of contract between him and the carrier: but there is no such privity between the latter and the consignee. Here too the booking was paid for by the consignor, which is evidence of a contract between him and the carrier. The carrier is ignorant of the particular agreement between the consignor and the consignee; and at all events the consignor is liable to the carrier for the price of the carriage if the consignee do not accept the goods. *Davis v. James*, 5 Burr. 2680. The liability of the consignor to the carrier is a sufficient ground to maintain this action. Both the case in 5 Burr. and that of *Moore v. Wilson* proceeded on the admission that the legal property passed to the vendee by the delivery to the carrier. All the cases of stopping in transitu (a) shew that until a delivery in fact to the consignee a latent right to the goods remains in the vendor even as against the vendee: but whatever the question may be as between those, it ought not to be permitted to the carrier to dispute the property of the person from whom he received the goods.

Lord KENYON Ch. J. I cannot subscribe to one part of the argument urged on behalf of the plaintiff, namely, that the right of property on which this action is founded is to fluctuate according to the choice of the consignor or consignee, and that consequently either of them may at his pleasure maintain an action against the carrier for the non-delivery of the goods. In my opinion the legal rights of the parties must be certain and depend upon the contract between them, and cannot fluctuate according to the inclination of either. This question must be governed by the consideration, in whom the legal right was vested; for he is the person who has sustained the loss, if any, by the negligence of the carrier; and whoever has sustained the loss is the proper party to call for compensation from the person by whom he has been injured. The facts are these; a man in *War-*

(a) Vid. *Mason and Others v. Lickbarrow*, and the cases there cited; and *Hodgson* in the Exchequer-Chamber, 1 H. Bl. 357. v. *Loy*, ante, 7 vol. 440.

wickshire gave an order for goods from *London*, which he directed to be sent by a certain carrier, and the dealer in *London* delivered them accordingly to that carrier to be conveyed to the vendee. Upon this short statement there can be no doubt but that after such a delivery the vendee must stand to the risk. Then here the *damnum et injuria* are to him and not to the vendor, the plaintiff. I do not find that any thing which I have advanced is broken in upon by the two cases which have been relied upon in the argument: the distinction which is there taken I fully adopt. In the one case the action brought by the consignor against the carrier was sustained, because the consignor was to be answerable for the price of the carriage; he stood therefore in the character of an insurer to the consignee for the safe arrival of the goods. And the subsequent case of *Moore v. Wilson* proceeded on the same ground. It is not disputed but that the consignee might have maintained the action in this case: then if the consignee had recovered a verdict against the carrier, how could such recovery by a stranger have been pleaded in bar to this action? And if it could not, and yet this action could be maintained, the consequence would be that the carrier would be liable to answer in damages to both for the same loss. Therefore common sense and justice as well as strict law are in favour of the objection made against the plaintiff's recovering in this action.

GROSE J. The plaintiff, who was at one time the owner of these goods, delivered them by the order of *Odey* to the defendant a common carrier for the purpose of having them conveyed to *Odey*. By such delivery they became the property of *Odey*; he was liable to be sued for the value of them; and it is admitted that he might have maintained an action for any loss or injury happening to them by the default of the defendant. It is true that, while the goods remained in the hands of the carrier, there was a latent right in the plaintiff to stop them in transitu: but that is in its nature an equitable right, though now grown into law; but the legal right was by the delivery to the carrier vested in the consignee by whose order they were so delivered. But cases have been cited, wherein it was holden that the consignor might maintain the action: on looking into them however it appears that they proceeded on the ground of special agreements between the respective consignors and carriers. Now here there was no evidence of any such agreement; and the letter from the plaintiff to *Odey*

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excludes the idea of any such agreement; for the former therein insists that the property was vested in the consignee, whom he considered as at all events answerable to him for the value. Then after it appears that the plaintiff had renounced all right and property in the goods at the time, upon what ground can he claim an indemnity for the loss of what belonged to another? I am therefore of opinion that the action against the carrier ought to have been brought by the consignee of the goods, in whom the property was vested by the delivery to the carrier according to his own order.

LAWRENCE J. Some stress has been laid on the circumstance of the consignor having paid the carrier for booking the goods, as evidence of a special contract between them, in order to bring this case within those which were cited at the bar: but that circumstance would not give a right of action against the carrier to recover damage for the loss of the goods, if it appeared that they were the property of another person. And here it is admitted that the action might have been brought by the consignee in right of his property in them. It is true that in some special cases a man may make himself liable to either of two persons on account of the same interest: but that is not usual; and it is more consonant to the general principle of law to refer all transactions of agents to the principal on whose account they were entered into. Now here I consider that what was done by the consignor in respect of the booking was as the agent of the consignee, at whose risk the goods were sent. And, generally speaking, the carrier knows nothing of the consignor, but only of the person for whom the goods are directed, and to whom he looks for the price of the carriage upon delivery.

LE BLANC J. It is admitted that the legal property of the goods was by the delivery to the carrier vested in the consignee, and that he might maintain the action: and upon examination of the cases referred to in support of the consignor's right of action, it appears that they proceeded upon the ground of a special agreement between the parties that the consignor was to pay for the carriage of the goods. But, as there was no evidence of any such agreement in this case, I think that the nonsuit was proper.

Rule discharged (a).

(a) Vid. *Snee v. Prescott*, 1 Atk. 248. accord.

1799.

Tuesday,
Nov. 12th.JENNINGS *against* RUNDALL.

THE first count in this declaration stated that the plaintiff on &c. at the instance and request of the defendant delivered to the defendant a certain mare of the plaintiff to be moderately ridden by the defendant, yet that the defendant contriving and maliciously intending to injure the plaintiff whilst the mare was in the defendant's custody under such delivery and before the same was returned to the plaintiff on &c. wrongfully and injuriously rode used and worked the said mare in so immoderate excessive and improper a manner, and took so little and such bad care thereof, that by reason of such immoderate &c. riding &c. the said mare became and was greatly strained damaged &c. In the second count it was alleged that the plaintiff at the instance and request of the defendant let to hire and delivered to the defendant a certain other mare to go and perform a certain reasonable and moderate journey &c, yet that the defendant contriving &c, wrongfully and injuriously rode and worked the said mare a much longer journey &c. There was also a count in trover for two mares.

The defendant pleaded his infancy to the two first counts, to which plea the plaintiff demurred.

Marryat, in support of the demurrer, (after observing that it was immaterial whether or not infancy could be pleaded to the second count, because it being pleaded to both counts if it were a bad plea as to either count the whole plea was bad,) contended that, as the first count was not founded on a contract but on a tort, the defendant could not plead infancy to it. That that count did not state any consideration for the delivery of the mare by the plaintiff to the defendant, or any promise by the defendant to take care of her or to redeliver her: but that it appeared to be a delivery on bail to the defendant who had abused the plaintiff's property. That the tort here did not consist in mere neglect or omission, but in a tortious act done by the defendant. That the dictum in the books, that if the action arise out of the contract the plaintiff shall not by declaring in tort prevent the defendant pleading infancy, must be confined to cases where the wrong complained of consists in omission, or in some act which is a tort only by construction of law. That such was the ground of decision in *Grove v. Nevill*, 1 *Keb.* 778. (said in 1 *Keb.* 913, 914. to have been

VOL. VIII. 4 R decided)

A plaintiff cannot convert an action founded on a contract into a tort, so as to charge an infant, defendant. Therefore where the plaintiff declared that at the defendant's request he had delivered a mare to the defendant to be moderately ridden, and that the defendant maliciously intending &c. wrongfully and injuriously rode the mare so that she was damaged &c, it was holden that the defendant might plead his infancy in bar, the action being founded on a contract.

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decided) where in an action upon the case in nature of a deceit on sale by the defendant of goods as his own, when in truth they belonged to another, the Court said "This is no *actual* tort, or any thing *ex delicto*, but only *ex contractu*." That in *Johnson v. Pie* (a), where the defendant had falsely and fraudulently asserted himself to be of full age, and had as such executed a mortgage to the plaintiff, and where it was holden that the defendant, an infant, was not answerable, the action was founded on the very contract in which the defendant had cheated the plaintiff: whereas here is a tortious act done by the defendant, and that too subsequent to the time when any supposed contract could have been entered into respecting the hire of the mare. He observed that an infant is answerable in an action for slander, *Noy* 129; because there an act is done by the defendant; and in that case it was said that *malitia supplet ætatem*; so here malice is laid. That in trover an infant is also responsible on account of the wrongful conversion subsequent to the bailment; though in most instances in trover the act is only a breach of trust or violation of some duty. And that even in an action of trespass for mesne profits he cannot plead infancy, though there he becomes a trespasser by construction of law. That if an infant wilfully destroyed any thing that had been bailed to him, there is no doubt but that he would be liable in an action for the tort; and that this was in effect the same, because here he rendered a mare, that had been bailed to him, less valuable by his wrongful and injurious act.

Wood, contra, was stopped by the Court.

Lord KENYON Ch. J. The law of *England* has very wisely protected infants against their liability in cases of contract; and the present case is a strong instance to shew the wisdom of that law. The defendant, a lad, wished to ride the plaintiff's mare a short journey; the plaintiff let him the mare to hire; and in the course of the journey an accident happened, the mare being strained; and the question is whether this action can be maintained? I am clearly of opinion that it cannot; it is founded on a contract. If it were in the power of a plaintiff to convert that, which arises out of a contract, into a tort, there would be an end of that protection which the law affords to infants. Lord *Mansfield* indeed frequently said that this protection was to be used

(a) 1 *Keb.* 905, 913; and 1 *Lev.* 169.

as a shield, and not as a sword; therefore if an infant commit an assault, or utter slander, God forbid that he should not be answerable for it in a court of justice. But where an infant has made an improvident contract with a person who has been wicked enough to contract with him, such person cannot resort to a court of law to enforce such contract. And the words "wrongfully, injuriously, and maliciously," introduced into this declaration cannot vary this case.

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GROSE J. I am of the same opinion. In the case of *Manby v. Scott* (a) this distinction was taken, that if the action against an infant be grounded on a contract the plaintiff shall not convert it into a tort; "If one deliver goods to an infant on a contract knowing him to be an infant, the infant shall not be charged for them in trover and conversion; for by that mean all infants in *England* would be ruined." A very few years after the decision of that case the case of *Johnson v. Pye* arose, according to one report of which Lord Ch. J. *Keeling* expressed great indignation at the attempt to charge an infant in tort for that which was the foundation of an action of assumpsit; he said "The judgment will stay for ever, else the whole foundation of the common law will be shaken; for this was but a slip, and he might have pleaded his minority here."

LAWRENCE J. The true distinction is that mentioned by my Brother *Grose*, and not that stated at the bar, between negligence and an act done by the infant. It is argued that if no act be done by the infant he may plead his infancy, but that infancy is not a defence where an act has been done: if that were so, an infant would not be liable in many instances of trover, where the conversion consists merely in a non-delivery; and yet in trover an infant is always liable. According to the same rule, if an action were brought against an infant for negligently keeping the plaintiff's cattle by which they died, infancy might be pleaded in bar; but if the declaration charged the defendant with having given the cattle bad food, by which they died, it could not. But this certainly is not the true distinction.

LE BLANC J. The plea of infancy is a good bar to this action, on the ground that the act done in this case is the foundation of an action of assumpsit. And the reason of the distinction taken in the case in *Siderfin* is, that the plaintiff shall not by changing the

(a) 1 Sid. 129.

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form of the action vary the liability of the infant. Now if the plaintiff could not have maintained an action of assumpsit against the infant, neither can he maintain the action in its present form. On this short ground, therefore, I think that the plea of infancy is a good defence to this action.

Judgment for the defendant.

Monday,
Nov. 11th.COPPINGER *against* BEATON.

It is sufficient to state in an affidavit to hold to bail that the defendant is indebted to the plaintiff in such a sum "for money had and received on account of the plaintiff," without adding "received by the defendant."

THE affidavit to hold to bail in this case, made by the plaintiff, stated that the defendant was indebted to him in the sum of 12,000 l. and upwards, "for money had and received on account of this deponent, as the owner of a certain ship or vessel called the *Guardian*."

Gibbs on a former day in this term moved to discharge the defendant out of custody on filing common bail, on the ground that the affidavit was defective, in not stating that the money was had and received *by the said defendant*.

Erskine and *Marryat* now shewed cause against that rule. They insisted that the affidavit was sufficiently certain; and that, if the defendant had not received this money on the plaintiff's account, the latter might be convicted of perjury on this affidavit.

The Court were of that opinion; saying that no precise form of words was required to be used in an affidavit to hold to bail; that it was sufficient to allege that the defendant is indebted to the plaintiff in a certain sum of money, specifying the cause of action; that that was so stated in this affidavit, for that it could not be said that the defendant was indebted to the plaintiff unless the money had been received by the defendant. And they added that the Courts ought not to entangle the suitors in unnecessary niceties.

Rule discharged.

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Wednesday,
Nov. 13th.The KING *against* The Inhabitants of INGWORTH.

AN order of two justices, by which *S. Slaughter* his wife and their two children were removed from *Ingworth* to *Erpingham*, was on appeal quashed by the quarter sessions for the county of *Norfolk*; and the following case was reserved for the opinion of this Court.

"In the year 1781 *S. Slaughter*, the father of *S. Slaughter* the pauper, went with his wife and *S. Slaughter* the pauper as part of his family to reside in the parish of *Ingworth* under a certificate from the parish of *Erpingham*. In the year 1787 the pauper, then of the age of 16, let himself to *J. Brettingham* of *Erpingham* and served two years as a yearly servant. He then let himself to *W. Clarke* of *Erpingham* and served him as a yearly servant for a year. He afterwards let himself from three days after *Michaelmas* 1790 to the *Michaelmas* following to *M. Kemp* of *Brickling* farmer, and completed his service. At the expiration of the year he returned to *Ingworth*, where his father still resided under the certificate, and lived in his said father's house about a month, during which time he worked as a day labourer at *Brickling*, and paid his father for his board. When he returned to *Ingworth* he did not consider himself as going with a view to the certificate. At the expiration of the month he let himself for a year to *B. Newstead* of *Ingworth*, and lived in his service two years."

If the son of a certificated person serve a year under a yearly contract in the parish granting the certificate, and then return under age to the father's house for a short time, and then serve another year with another master under a yearly hiring in the certificated parish, he does not gain a settlement in the latter parish.

Mingay, in support of the order of sessions, contended that the pauper *S. Slaughter* had gained a settlement in *Ingworth* by a hiring and service for a year with *Newstead*, notwithstanding his father was then residing at *Ingworth* under a certificate from *Erpingham*; for that, with regard to the pauper, the certificate was then functus officio. He said that the age of the pauper at the time of his service with *Newstead* was immaterial, because he was then emancipated by having served several years as a servant in other parishes. That the pauper's return to the parish of *Ingworth* was merely accidental; that he did not return to it for the purpose of residing under the certificate, for though he returned to his father's house, yet it was not to claim protection as one of his father's family, it being stated in the case that he paid for his board. And that in *R. v. Newington* (a) it was ruled that, when

(a) *Ante*, 1 vol. 354.

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a certificated person quits the certificated parish without any intention of returning to it, the certificate is at an end.

LORD KENYON, Ch. J. (stopping *Leycester* and *Hulton* contra). Although the decisions in some of the cases on settlements are very nice, whenever we find a case precisely similar to the case in question, we ought to be governed by it. Now it appears to me that the case of *R. v. The Inhabitants of Keel* (a) is exactly like the present. There indeed Lord Mansfield at first doubted whether or not the pauper returned to the certificated parish under the certificate, but afterwards he was of opinion that the pauper had returned under the faith of the certificate. If the pauper in this case had gained a settlement in a third parish, the reasoning in support of this order would have applied: but here is no ground for presuming, as in *R. v. Newington*, that the parties had abandoned this certificate, for the pauper's father was resident at *Ingworth* under the certificate when the son returned to him.

LE BLANC J. mentioned the case of *R. v. Collingbourn Ducis*, (b) the principle of which (he said) applied to the present case.

Per Curiam,

Order of sessions quashed.

(a) *Cald.* 144.

(b) *Ante*, 4 vol. 199.

Wednesday,
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The KING against The Company of Proprietors of
the STAFFORDSHIRE and WORCESTERSHIRE Canal
Navigation.

A navigation act empowered the proprietors to take so much per mile per ton for all goods carried along the canal; held that they were rateable to the poor for the tolls in the different parishes where the tolls became due, that is, where the respective voyages finished; though for their own convenience they were authorised to collect the tolls where they pleased, and did in fact collect them in other parishes.

THE defendants appealed to the quarter Sessions for the county of Worcester against a rate made in December last for the relief of the poor of the chapelry or hamlet of *Lower Mitton* in the parish of *Kidderminster* in the county of Worcester, whereby they were rated for "their basons, towing-paths, and that part of their canal and the locks lying within *Lower Mitton*, and for the tolls and duties arising therefrom due at *Lower Mitton* on 1500*l.* at the sum of 75*l.*; for their lands wharfs cranes weighing-machines and timber-yards in their own possession on 12*l.* at the sum of 12*s.*; and for part of *Jones's* land also in their own possession on 2*l.* 10*s.* 0*d.* at the sum of 2*s.* 6*d.*" On hearing the appeal the Sessions confirmed the rate on the Company for their lands wharfs cranes weighing-machines and timber-yards in their own possession on 12*l.* at 12*s.* and for part of *Jones's* land also in their possession on 2*l.* 10*s.* 0*d.* at 2*s.* 6*d.* without opposition. The court also confirmed

firmed the rate on the Company for their basons towing-paths and that part of their canal and the locks lying within *Lower Mitton* and for the tolls and duties arising therefrom due at *Lower Mitton* on 1500*l.* at 75*l.* in manner following, viz. they confirmed the rate of 75*l.* upon the said 1500*l.*, so far as respects 350*l.* (part of the sum of 10,000*l.* after mentioned) payable for and in respect of the lock-duties on passing through the locks lying within *Lower Mitton* hereinafter described, without opposition; and they also confirmed the rate of 75*l.* upon the said 1500*l.*, so far as respects the residue of the said 10,000*l.* after mentioned, payable for and in respect of the tolls and duties due at *Lower Mitton*, hereinafter also described, subject to the opinion of this Court, as to this last charge, on the following case.

The rate was duly allowed and published. By an act of the 6th of *Geo. 3.* the Company are empowered to take rates and duties for tonnage and wharfage for all goods conveyed on the canal not exceeding 1½*d.* per mile for every ton, and so in proportion for any greater or less quantity than a ton; which rates and duties are directed by the act to be paid to such persons at such places near the canal in such manner and under such regulations as the Company shall appoint; with a power of distress in case of non-payment. It is further enacted that for the more easy collecting of the rates and duties the master &c of every vessel navigating on the canal shall give a just account in writing signed by him to the collectors of the tonnage or duties at the places where they attend for that purpose of the quantities of goods in such vessel, from whence brought, and where they intend to land the same; and if such goods be liable to pay different tolls, then such master &c. shall specify the quantities liable to the payment of each toll; and in case they neglect or refuse to give such account, or give a false account, or deliver any part of their loading at any other place than is mentioned in that account, they are to forfeit to the Company 10*s.* for every ton of goods so falsely accounted for &c, over and above the respective rates and duties payable for the same, and recoverable in the same manner &c. By another act of the 10th *Geo. 3.* the Company are authorized to take tonnage proportionably for any less distance than a mile, which any commodities shall be conveyed on the canal, to be collected recovered and applied as the former tonnage rates; and the vessels &c

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passing through the two locks erected between the river *Severn* and the canal basin are to pay a toll or lock-due at the rate of 1*d.* per ton in lieu of the tonnage of 1½*d.* per mile fixed by the said recited act; and the said tolls or lock-dues are to be collected recovered and applied as before directed &c. By the same act of the 10th *Geo.* 3. it is enacted that the shares of the Company, which by the former act the proprietors held in the nature of real estates, shall be deemed personal estates &c. The lock-dues received by the Company in the last year for boats and other vessels passing through the said two locks, which locks are locally situated in the hamlet of *Lower Mitton*, amounted to 350*l.* The tonnage of the goods brought in boats down the canal and landed at *Stourport*, which is in the hamlet of *Lower Mitton*, and the termination of the canal, or transhipped therefrom on board canal boats to *Severn* barges, amounted in the year 1798 to 9650*l.* making together with the said 350*l.* the sum of 10,000*l.*, which sum of 9650*l.* arose in the following manner; viz. [Here the case set forth the different sums received for the tonnage of goods taken in at different places on the canal, shewing how much the tonnage amounted to in each parish, reckoning by the number of miles that the canal passed in the several parishes; according to which mode of calculation, by the mile, a very small part of the toll arose in *Lower Mitton*.] But the said sum of 9650*l.* was not received by the Company at *Lower Mitton*, but at the several places where the goods were shipped. The expences of repairing the basin and that part of the canal which lies within the hamlet amount annually to 540*l.* Other parts of the canal and basins lying out of the hamlet are also repaired at a great annual expence; and the repair of every part contributes to the profits and use of the whole canal. The dividends per share of each proprietor of the canal for the year 1798 amounted to 32*l.* clear of all expences and deductions. The agents of the Company on receiving accounts in writing of the quantities of goods which are in each vessel, and of the places where the same are intended to be landed, in the manner required by the first act, deliver permits to the master &c of every such vessel &c to navigate the same accordingly upon the canal. The Company are not carriers upon the canal, nor the owners of any of the vessels employed thereon; and the payment of the tolls on goods carried on the canal is by the direction of the Company made to their agents at the places where

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such goods are laden or shipped ; and the Company consider such places as the places at which they become due under the act. The land used in the canal, the towing paths, and basons lying in the hamlet of *Lower Milton*, measure 8 a. 2 r. 13 p.; and the land used in the whole of the canal towing paths and basons measure 370 a. 2 r. 7 $\frac{3}{4}$ p. The length of the whole canal is 46 miles and an half amounting to 81,840 yards; 1367 yards of which, including the length of the bason, and measuring to the *Severn* lock, being the termination of the canal, lie in the hamlet of *Lower Milton*; so that that part of the canal which lies within the hamlet bears to the whole length of the canal the proportion of about one to sixty.

Erskine, *Manley*, and *Jervis*, in support of the order of sessions. There are but three places in which the defendants can be rated in respect of this species of property ; either, 1st, Where the goods are landed, for there the tolls are properly due ; or 2dly, Where the tolls are actually received ; or 3dly, In the several parishes through which the canal is carried, and in proportion to the distance which the several goods are conveyed along the canal in each parish, the profits of the Company being regulated in proportion to such distance. Now the first of these is the most proper places for rating ; because it is more equitable that the profits of the Company should be rated in those parishes where the goods are landed ; for as that usually takes place in some central situations most convenient for the inhabitants in general of the neighbourhood, where wharfs and other buildings are in consequence erected, it necessarily happens that a greater number of poor persons are collected in those situations than would otherwise be the case, and consequently the poor-rates are there increased by the very means which tend to the prosperity of the Company. But in either of the other modes of rating proposed, the Company after contributing to increase the population and expence of maintaining the poor in one district may be rated in parishes out of which the population has been thus drawn, or where it exists only in its ordinary proportion, and where the poor-rates are consequently low. It is however to be contended that these tolls are rateable only in the place where they are actually received, because there only are they local visible property belonging to the defendants ; and this is likened to the cases of a lock, sluice, or turnpike, for passing through which a toll is payable, according to the rule laid down in the cases of *The King v. Cardington* (a), and *The King v. The Mayor &c. of London* (b).

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(a) *Cowp.* 581.(b) *Ante*, 4 vol. 21.

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But those cases are very distinguishable from the present. It is immaterial where the tolls are collected, as much so as where the rent of an estate is paid. The true question is where and in respect of what do they become due? for there alone are they rateable. In the case of *Cardington* the tolls were adjudged to be rateable in the parish where the sluice was locally situated in respect of which they were paid, though in fact they were collected, not at the sluice, but in another parish. That therefore was a case of local property yielding a certain profit to the owner; and the subject-matter of the rate was not the toll, but the sluice itself. So in the *Hamptonwick* case (a) the subject-matters of the rate were the barge-way and toll-gate, which were local property situate in the hamlet yielding a certain annual rent to the city of *London*. So, in the present case it is not disputed but that the particular toll arising from the lock in the hamlet of *Lower Milton* is rateable there only, although by means of such lock the whole navigation is rendered more useful. But with respect to all the rest of the tolls there is no locality, nor can they be said to depend on or arise from any one part of the navigation more than another, and in this respect this case differs from the cases alluded to. The subject-matter of the rate is the toll, eo nomine, paid for the privilege of passing over the whole line of the particular voyage, and not any local property in any particular district yielding such tolls. The tolls therefore should be rated at the place where they become due. Now the tolls become due in the places where the goods are respectively landed. For though in each particular case the amount is calculated at so much per mile, according to the distance which the goods are carried upon the canal, yet it is all one entire contract, and nothing is due until the delivery. This was fully settled in the case of the *Aire and Calder Navigation* (b), and in the *King v. Page* (c). In the former of those cases the Court held that the tolls were rateable in the two parishes where they were collected, which were the two termini of the navigation; not on the ground of the money being accidentally received there, for that was disclaimed by the Court, but because they considered that the tolls became due there. And that is an answer to the first method which the Company wish to be adopted here. For the same reason also the Court held that the tolls were not rateable in the intermediate parishes, through which they barely had a passage. And that is an answer to the other mode of rating suggested by this Com-

(a) *Ante*, 4 vol. 21.(b) *Ante*, 2 vol. 550.(c) *Ante*, 4 vol. 543.

pany. Independently of which the difficulty of making such a calculation, as would distribute the proportion equally between the respective parishes, would be a sufficient reason for not adopting that principle of rating. But the case of the *King v. Page* (a) is precisely in point with the present. There the proprietor of the navigation from *Reading* to *Newbury* was entitled to a toll of 4s. per ton for goods carried from either of those places to the other, and to a proportionable sum for any less distance, and was also enabled to appoint any place adjoining the river for the collection of the toll; and he had in fact appointed an intermediate parish for that purpose; notwithstanding which the Court held that the toll for the goods which were carried the whole distance from one of the termini to the other was rateable where the goods were landed, because they became due where the voyage was completed. It is no answer to this case to say that the acts of parliament for regulating this navigation enabled the defendants to appoint any place for the receipt of the tolls, and that therefore the tolls *are due* at such appointed place; because the same power was given in *Page's case* and exercised by the proprietor there: but the Court thought that that made no difference; that it was a mere regulation in case of the collection, and not intended to vary the contract between the parties. Nor can it be said that the reasoning on which that proceeded is only applicable to the case of carriers whose contract is entire, and that here the Company are not carriers; for there the profits rated arose from the toll, *quà toll*, due to the proprietor. And besides, the contract is as much entire with respect to the navigation owners as with respect to carriers; for the certificate which the former give is for leave to pass the whole distance; and no doubt if the consideration failed by any default of theirs, as by a defect in the navigation itself, the whole duty paid would be recoverable back again, although the goods might have proceeded some part of the way. On the whole, convenience as well as justice concur in support of the mode of rating adopted in this case.

Law, Gibbs, Caldecot, Touchet, and Ryder, contra. First, the defendants object to the principle of rating contended for on the part of the hamlet of *Lower Mitton*, because the whole reasoning in support of it is built upon a supposition that this is like the case

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of a carrier, to which it bears no analogy. There the voyage and contract are entire: nothing is due pro rata if the engagement be not performed in toto. And such was the case of the *Aire and Calder Navigation* (a), where the proprietors were also the carriers. Whereas here the toll is paid by way of anticipation for a certain permit or license to navigate on the canal according to a certain rate per mile per ton: that being settled, the Company have no further concern with the goods; they make no engagement for the safe carriage or arrival of them: and whether the goods be safely carried or not, or whether the owner choose to land them short of the stipulated distance, he cannot recover back any part of the consideration pro rata, unless perhaps the navigation were impeded by any fault or neglect of the Company themselves. The permit or certificate is no evidence of the entirety of the contract, but is merely required as a regulation to prevent fraud. The act itself states it to be "for the more easy collection of the rates" &c. If then this be not like the case of a carrier, upon which ground the other cases were determined, the mode of rating which has been here adopted cannot be supported; because there is no visible property belonging to the Company in this hamlet, (except the lock, the rateability of which in the hamlet is not disputed,) which is the subject-matter of rating. Resort therefore must be had to one or other of the only two remaining methods which have been pointed out. And, first, the most obvious place for rating these tolls, as contradistinguished from the real property itself out of which they arise, seems to be in the parish where they are received; for there only can they be said to be visible property of the defendants. This question could not arise in the *Aire and Calder Navigation* case, because in fact the tolls were rated in the two parishes where they were received. And though that was otherwise in the case of *The King v. Page* (b), yet that case proceeded on the ground of an entirety of contract, like the case of the carrier; for there the act imposed a single duty of 4s. per ton upon the whole distance between the two termini; and Lord *Kenyon* expressly avoided giving any opinion on a case where the duty is made payable proportionably at so much per mile. In that case therefore, so far as it was decided, the whole duty being payable as upon one entire contract, it was indifferent where it was collected: but here, there being no such entirety, it can only be due either proportionably

(a) *Ante*, 2 vol. 660.(b) *Ante*, 4 vol. 543.

according to the number of miles in each parish through which the goods pass, or in the place where by the authority of parliament the Company have appointed that it shall be collected. Those therefore are the places where the tolls *become due*, and where according to the prosecutor's own argument they ought to be rated. This is much more like the case of a turnpike than that of a carrier. The road like the canal may run through many parishes, and must all be repaired out of the same fund; and the passage through each parish contributes to increase the general fund. The Legislature enables the trustees in the one case, and the proprietors in the other, to collect the tolls where they think proper along the line of passage: in neither case therefore can the tolls be said to be due but on the spot where they are appointed to be collected; and there only can they be said to be visible property of the persons for whom they are collected. Neither is there any hardship or unfairness in rating them there; for it is as probable that there should be a large population collected where the goods are usually shipped as where they are usually landed; as many persons and machines are necessary to load as to unload the vessels. This is also less open to fraud than the mode of rating contended for on the other side, because the Company may choose where they will ship the goods; but the delivery must necessarily be according to the will and convenience of the shippers. But if the Court should not think that the tolls are rateable where they are received, then inasmuch as they accrue to the Company in proportion for every mile of the navigation along which the goods are carried, they ought to be rated proportionably in each parish through which the canal passes, in proportion to the distance which the goods pass through each. This mode of rating is founded in justice; because the land which has been applied to the purpose of the navigation was before productive and contributed to the maintenance of the poor; it is but fair therefore that it should contribute in its present state. And though some parts of the canal may be more navigated than others, yet every part contributes to render the rest more productive. There is no greater difficulty in this calculation than in the one which has been adopted. But whatever difficulties might have existed *à priori*, none such exist now in the present case as amended (a), for the proportions of the tolls in respect of each parish are

(a) The case upon the first argument was sent down to be restated more particularly as to these facts.

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in fact stated; and the very circumstance of the Court ordering the case to be restated for the purpose of ascertaining those proportions according to the number of miles over which the several goods were conveyed in each parish shewed that the Court did not consider the difficulty to be insurmountable.

Lord KENYON Ch. J. I consider that this case is brought forward to give us an opportunity of reviewing the opinions we delivered in the former cases that have been alluded to: but on reconsideration, I do not see any reason to induce me to change the opinion I then gave. In the first of those, *R. v. The Undertakers of the Aire and Calder Navigation*, which was decided soon after I came into this court, though it differs from the present case, some rules were established applicable to this case. But I cannot distinguish the other case, *R. v. Page*, from the present in principle and in substance, though there are some nice distinctions between them. And if the rules there laid down had occasioned any great inconvenience, the parties interested have had in the interval of several years many opportunities to apply to the Legislature for a remedy: but no application of that kind having been made, I presume that no inconvenience has resulted from those determinations. This does not appear to be a contest between the parishes through which the canal passes and the Company of Proprietors, but the Company are struggling against the rate altogether. To this Company indeed as well as to others of the same kind the public are much indebted for their undertakings: but they ought to contribute to the relief of the poor in common with the owners of all other species of property in proportion to the profits that they acquire. As the Company have objected to the present mode of rating, I am anxious to know what other mode they would substitute for it: on this point however their counsel have left me in great doubt. They give me the choice of two modes; they wish the Company either to be rated for the whole in the parish where the tolls are received, or for the different parts in the different parishes through which the canal passes in proportion to the number of miles in each parish: but they have not named that mode on which they choose to rely. I rather think that they would not be satisfied with the first of those methods; because, after receiving the tolls in one parish for the whole voyage, it is too much to say that the Company should retain them in the event of the owners of vessels not being able to go the whole voyage either on account of the locks being out of repair, the banks giving way, or any other accident of that kind.

kind. It is not therefore the most convenient place to rate the tolls where they are collected. Then it is said that the other mode of rating should be adopted, because the land over which the canal passes was before rateable to the poor, in respect of its produce. But insuperable difficulties occur to this mode. It is admitted that all property should be rated to the poor according to its meliorated state: but on account of the difference of expence attending the cutting of a canal in flat and hilly countries, it is almost impossible to ascertain the precise degree in which the property is meliorated in each particular parish.

The bar are already in possession of the reasons which we gave in the case of *R. v. Page*, and therefore it is not necessary to repeat them. It seems to me, after reviewing the whole of the subject and considering which is the most eligible mode of rating the property in question, that the mode adopted below is that which approaches nearest to justice. It is sufficient therefore to say that I continue to think that the case of *R. v. Page* was rightly decided, and as I cannot distinguish this case from that in principle, the present rate must be confirmed.

GROSE J. The great object in this case is to find out the true principle according to which the tolls ought to be rated. This very point was much considered in the case, *R. v. Page*, where after the best consideration that I could give to the subject it appeared to me that tolls of this kind should be rated where they become due: and I cannot on reconsideration discover any other mode of rating less exceptionable than that. That mode may possibly be liable to some objection, and so is every other mode that has been suggested: but that mode appears to be most consistent with the justice of the case, and to be attended with fewer difficulties and objections than any other, and it is not inconsistent with any clause in the act of parliament by which the tolls are imposed. The Lord Chief Justice has stated his objections to both the modes of rating proposed by the Company; and I entirely agree with his Lordship on those points. In answer to one argument at the bar, that the money was not paid for the tonnage but for the permit to pass on the navigation, it is sufficient to refer to the act of parliament which empowers the Company to take for tonnage for all goods conveyed on the canal such rates and duties &c not exceeding $1\frac{1}{2}d.$ per mile for every ton: the rates therefore are not payable until the goods are conveyed, for until they are conveyed, it is impossible to say how much will become

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become due. For though the money may be paid in advance for the convenience of the Company, in many instances it must be returned if the voyage cannot be completed, because until the voyage is completed no money becomes due under the act of parliament. On the whole, therefore, I think that the mode of rating adopted in the case of *R. v. Page*, which seems less objectionable than any other, ought to be adopted in the present case.

LAWRENCE J. The Company, who object to the present mode of rating, say that they should be rated for the tolls either in the parish where they are collected, or in the several parishes through which the canal passes according to the distance in each. Their counsel would not absolutely choose the first; they seemed rather to prefer the latter mode. But considering that this is a *rate on tolls*, the proprietors of the tolls must be rated either in the parish where the tolls become due or in that where they are received: but I think they cannot be rated in the parish where they are actually collected, because many cases may be put in which the tolls, though received, must be returned to the owners of the goods. Therefore it seems to me that the tolls should be rated in the parish where they become due, that is, where the voyage is complete; and what was said by Mr. J. Buller in giving his opinion in *R. v. Page*, comparing this to the case of a carrier, deserves great weight. But it has been argued that this resembles the case of *R. v. Cardington*, where the tolls became due on passing the sluice: but it must be remembered that there the toll was paid for the use of the lock; and if the owner of the vessel, after paying the toll, had been prevented pursuing his voyage, he could never have recovered back his money because he had had the use of the lock. Nor is this like the case of a turnpike; for there the tolls are paid for the benefit of the public and not for the use of any individuals, and those tolls are not the subject of taxation within the statute of 43 *Elizabeth*; there also the money is paid for the privilege of passing through the gate, and the party having once paid it cannot under any circumstances recover it back again. It seems to me therefore that this question was very rightly settled in *R. v. Page*, which case cannot fairly be distinguished from the present.

LE BLANC J. This is a rate on tolls, and not on land. It is admitted that tolls, as such, are rateable property, and that such property is rateable in the parish where it arises; now it was decided

cided in *R. v. Cardington* and in other cases that by this expression, where it arises, we are not to understand the parish where the tolls are actually received, but the parish where they become due. The question then in this case is, where do these tolls become due or payable? It has been said that the tolls are not paid to the Company in respect of a contract for the carriage of goods, but for the privilege or liberty of carrying goods on their navigation: but, in each instance, it is an entire contract to pay so much for the liberty of carrying goods for a certain space along the canal, and until the contract on the part of the Company, giving the privilege of carrying the goods on their navigation, is performed, nothing becomes due to them. If the contract be for the liberty of sending goods the whole length of the navigation, the contract is not performed on their part and nothing becomes due to them for tolls until the goods are conveyed to *Stourport*: if the contract be for the privilege of conveying goods an intermediate voyage, to some place short of the whole distance, the tolls do not become due until such shorter voyage is performed. But this very question has been already determined in the case so frequently alluded to, *R. v. Page*; and unless the Court felt that there were some strong objections to the mode of rating adopted in that case, that decision ought to govern the present case. Now no mode of rating these tolls more consistent with justice or with policy than the rule there adopted has been pointed out. The counsel for this Company have indeed contended that this case is distinguishable from that in this respect, that there the toll was limited at a gross sum, 4s. per ton, for the whole voyage, and so proportionably for a greater or less distance, whereas here the toll is 1½d per ton per mile: but there is not in reason any distinction between the two cases on that account, in the one case as well as in the other the rate of tonnage is calculated at so much per mile. Not being able therefore to distinguish that case from the present, nor seeing any ground on which I can say that that decision is not consistent with the rules of law or public policy, I am of opinion that the order of Sessions must be confirmed.

Per Curiam,

Order of Sessions confirmed.

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WORCES-
TERSHIRE
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Wednesday,
Nov. 13th.

The KING *against* The Steward, Foreman, Treasurer, Book-keeper, and Freemen of the Company of Free Fishermen and Dredgemen of the Manor and Hundred of FAVERSHAM in the County of KENT.

In a return, to a mandamus to a corporation to restore a member who has been removed, it should appear that the body removing had proved the charge for which the member was removed. —It is not sufficient to state merely that he was present when the charge was made and did not deny it. —Abye-law, made by a Company carrying on trade in partnership, to prevent any one of the members carrying on a separate trade on his own account, is good;
semb.

TO a mandamus, requiring the defendants to restore *M. Harman* to the office of one of the freemen of this Company, the defendants made a return; stating that the Company are a Company by prescription, and from time whereof &c have held of the lord of the said manor and hundred certain oyster-grounds within the said manor and hundred, and during all that time have laid and kept oysters upon the said grounds for the common use and benefit of the said Company, *and have carried on a trade in oysters in partnership together for the common use and benefit of the freemen of the said Company.* That from time whereof &c certain courts called Water Courts have been holden within the said manor and hundred, at which the Company have been used to make orders for the management of the said trade and regulating the members of the Company with regard thereto, and to nominate twelve freemen to be a jury to impose fines and amercements upon the freemen for neglect of duty, and for other purposes. That from time whereof &c the Company have been used to make orders for restraining any of the members of the Company from doing any thing for their own gain to the prejudice or detriment of the said trade. That from time whereof &c every person admitted to the freedom hath before admission taken an oath that he would be a true tenant to the lord for the fishing-grounds held of him, do his service, pay his rent, observe the customary laws that were or should be made by the tenants, pay such fines and amercements as the jury should impose upon him, and do in all things as a tenant ought or as near as he could. That *M. Harman* at the time of his admission into the Company took the said oath. That from time whereof &c the Company have disfranchised, subject to the confirmation of the lord, any of the freemen for a wilful breach of the said oath. That on the 30th of *July* 1748 at a Water Court then holden an order was made by the said Company that no tenant of the said manor and hundred should from thenceforth buy or lay any oysters in any of the oyster-grounds belonging to the said manor and hundred, or in
any

any creek or bank thereunto belonging, or within any creek or bank upon or near the *Kentish shore* for his own gain, unless obliged by bad weather and for the preservation of his oysters, on pain of forfeiting 20s. for every offence, to be levied to the use of the lord. That at the time of making that order it was and from thence hath been and still is prejudicial to the trade of the Company for any member so to lay his oysters; and that the order is in full force. That *M. Harman*, while a member, viz. in 1796, 1797, and 1798, wilfully and without being obliged by stress of weather or for the preservation of his oysters laid oysters for his own gain within a bank on the *Kentish shore*, called the *Conger Rock*, whereby he incurred three forfeitures of 20s. each. That at a Water Court holden on the 28th of *July* 1798 *Harman*, being personally present, was called upon to shew cause why he should not pay the said forfeitures, but that he did not shew any cause nor did he ask for any time to enable him so to do, but declared in the said court that he would not pay the same: that thereupon at the said court he was called upon to shew cause why he should not be disfranchised for his said refusal, but that he did not shew any cause nor did he ask for any time to enable him so to do; that therefore it was ordered by the said Court, in *Harman's* presence, that unless the said forfeitures should be paid to the steward of the said Court on or before the 4th day of *August* next for the use of the lord of the manor and hundred he should be and was thereby disfranchised from being a free fisherman and dredge-man of the said manor and hundred provisionally during the then next oyster season and until further order of Court. The return then stated that *Harman* did not pay either of the forfeitures on or before the 4th of *August* 1798, or afterwards; and that lord *Sondes* the lord of the manor and hundred on the 29th of *October* 1798 confirmed the said order of disfranchisement.

Wood, for the prosecutor, took several objections to this return. 1st, The bye-law, for which the defendants disfranchised the prosecutor, cannot be supported, because it is in restraint of trade. This bye-law does not merely restrain the fishermen within the limits of the corporation, but it also prevents them exercising their trade of buying or laying oysters on beds beyond those limits. Perhaps a restraint within the limits of the corporation might have been legal: but this bye-law extends to the *Kentish shore* and places near it. The word "near" is indefinite; and, on account of the uncertainty of the limits within which the bye-law meant to re-

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strain the fishermen, the bye-law itself is bad. If in its construction it extend to all places out of the county of *Kent*, in that view it is void, because it's tendency is to check the spirit and industry of the inhabitants of *Faversham*, to create a monopoly, and thereby to increase the price of the commodity. *Davenant v. Hurdis, Moor* 576. If this bye-law can be supported, every corporation in the kingdom may make a bye law to prohibit it's members carrying on their trade out of the limits of the corporation. Even a bye-law to prevent a man carrying on a trade in a particular place, unless he be free of that place, can only be warranted by custom; if such a custom exist, a bye-law may indeed be made to enforce it: but this is an attempt to impose a still greater restriction. 1 *Rol. Abr*, 364. 2dly, Even if the bye-law could be enforced, the disobedience to it is not a cause of disfranchisement. A penalty is inflicted by the bye-law for the breach of it; "no tenant &c. shall &c. on pain of forfeiting 20s. for every offence, to be levied to the use of the lord." This penalty therefore might have been recovered by action of debt, or perhaps a distress might have been taken for it: but the nonpayment of a penalty is not a legal cause of disfranchisement. Nor could the defendant be disfranchised for a breach of his oath merely, but only for some act which is in itself a cause of disfranchisement. 3dly, At all events the mode of proceeding was irregular and illegal. The proceedings should have been carried on in the same regular manner as on a conviction; there should be charge of the offence; a reasonable notice to the party to give him an opportunity of preparing for his defence; the hearing of the evidence on both sides; and then a judgment founded upon that. 1 *Burr.* 538. Whereas here was no previous accusation of the prosecutor of the mandamus; he had no notice that any charge had been or was to be exhibited against him; but happening accidentally to be present at one of the corporate meetings he was required to shew cause why he should not pay three penalties; no evidence was given in support of the charge; no time was allowed to him to make his defence; but at that very meeting he was disfranchised.

Bayley Serjt. in support of the return. First; It may be admitted that a bye-law cannot of itself impose a restraint of trade; but where the restraint is imposed by a custom (a) and the bye-law regulates or enforces it, the bye-law may be good if the custom be not unreasonable. Now here sufficient is stated in the former part

(a) Vid. *Woolley v. Idle*, 4 *Burr.* 1951.

of this return to shew that the bye-law may be supported. It appears that the Company are a Company by prescription; that they have immemorially laid and kept oysters on the grounds for the common use and benefit of the Company, and have carried on a trade in oysters in partnership together for their common use and benefit. It is afterwards stated that it is prejudicial to do that thing which the bye-law prohibits the members of the Company doing. But the only object of the bye-law is to prevent any one of the members of the Company carrying on a separate trade for his own individual benefit at the same time that he is enjoying the general benefit that all the members of the community enjoy together. A custom may restrain trade as far as it may be restrained by the contract of the parties. Now supposing a private agreement were made by several merchants in partnership that none of them should carry on trade on his own account during the partnership, there is no doubt but that such an agreement would be legal; and if so, such a bye-law as the present, founded on the custom, is also legal. Whatever restraints individuals may impose on themselves with regard to trade may also be imposed and enforced by a bye-law on a larger body. *Mitchell v. Reynolds*, 1 P. Wms. 181. In that case Lord Ch. J. *Parker*, in delivering the opinion of the Court, distinguished between a general and a partial restraint of trade; saying that the former was illegal and void, but that the latter is good if reasonable and on a good consideration. That distinction has been recognized and acted upon in subsequent cases; *Chefman v. Nainby*, 2 Ld. Raym. 1456; *Davis v. Mason*, ante, 5 vol. 118. Nor is this bye-law objectionable on account of the word "near." If the term itself be uncertain and indefinite, it may be explained by reference to the custom; and in this case no difficulty could arise on that head, because it appears that the fact was committed on the *Kentish* coast. At all events, if the bye-law be void as far as respects that word, the rest of the bye-law may be supported. Secondly; as it appears that the party was present at the time, there was no occasion for any summons for him to attend: nor was it necessary to go into evidence, because he did not deny the charge: but he having heard the charge, and declaring that he would not pay the penalties, and not wishing for further time, the Company proceeded to pronounce their judgment at once.

But the Court were clearly of opinion that the return could not be supported, on account of the irregularity of the proceeding. They said that it should have been proved that the prosecutor had

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committed the offence ; instead of which the defendants presumed him guilty, and called upon him to shew cause why he should not pay the penalties ; and that this was a decisive objection.

Lord KENYON Ch. J. said, I do not agree with the Counsel for the prosecutor in the whole of his objection to the bye-law. It must be remembered that the Company are partners as well as freemen. There is nothing illegal in partners agreeing to prevent any one partner carrying on a separate trade elsewhere on his own account ; and if not, I do not see any reason why the same thing may not be prevented by a bye-law in the case of a company like the present. With regard to the form of the bye-law indeed ; though a bye-law may be good in part and bad in part, yet it can be so only where the two parts are entire and distinct from each other. As to the irregularity of the proceedings in this case ; perhaps the prosecutor's appearing may have dispensed with the necessity of any summons to him to attend : but still the charge against him should have been proved. The proceedings also seem to be objectionable on other accounts ; it does not appear that the disfranchisement was by a court having authority to remove the prosecutor. Where a power of removal is not given to any particular part of a body, it rests with the company at large. In this case it is not stated that the court, at which the prosecutor was removed, was a court consisting of the whole body, but it is called a *Water Court*, which may be composed of the whole company or only of some part of it ; and if the latter, it should appear that they had the power of removal. Besides which, every member of the company having power to disfranchise should have notice to attend for that particular business. However it is not necessary to give any judicial opinion upon these points : it is sufficient to say that the return must be quashed for the objection alluded to, that the charge of which the prosecutor of this writ was accused was not proved.

So the return was quashed, and a peremptory mandamus awarded.

WEBBER *against* AUSTIN.

Thursday,
Nov. 14th.

The defend-
ant has as
many pleading
days to plead
after oyer is
granted as he
had when it
was demand-
ed.

THE declaration in this case was delivered in last *Easter* term, with notice to plead within the four first days of *Trinity* term. The defendant demanded oyer of the bond on which the action was brought on the third day of the *Easter* vacation, which was given on the day before the *essoign*-day of *Trinity* term. On the fifth day

day of *Trinity* term the plaintiff signed judgment for want of a plea; to set aside which judgment a rule nisi was obtained in the last term, on the ground that a defendant has as much time to plead after oyer has been granted as he had when oyer was demanded, and consequently that the judgment was signed too early.

The case stood over to this day, when

The Court (after conferring with the Master) said they were clearly of opinion that the present judgment was regularly signed; and that the general expression used in the books of practice (a), "that the party has *the same time* to plead after oyer is granted as he had when it was demanded," must be understood to mean "as much time in term time,—as many pleading days;" otherwise (they observed) if oyer were demanded on the last day of *Trinity* term and given the day before *Michaelmas* term the defendant would not be obliged to plead until the *Easter* term following. But, under the circumstances of this case, this judgment was set aside on certain terms.

Gibbs in support of the rule.

Pell against it.

(a) Vid. *Powell v. Gay*, 2 Str. 705; *Tidd's Pract.* 247. 348, 9; and *Impey's Pr. B. R.* 259. 6th ed.

The KING *against* WILSON and Eleven Others.

THIS was an indictment for a forcible entry and detainer at common law. The first count stated that the defendants on &c in the parish of *St. Peter* in the county of the borough of *Carmarthen* with force and arms, *unlawfully*, and injuriously, and *with a strong band*, entered into a certain mill, and certain lands, and houses, and the scites of a certain mill and certain houses, with the appurtenances, being in the possession of *M. Lewis*, and him the said *M. Lewis* from the possession of the said premises *unlawfully* and injuriously, and *with a strong band*, expelled and put out, and unlawfully and injuriously kept him out, and still keep him out, against the peace &c. The third count was to the same effect, only varying in the description of the premises. The second and fourth counts were the same as the first and third respectively, only omitting the words *with a strong band*. To all these counts there was a general demurrer, and joinder in demurrer.

Saturday,
Nov. 16th.
An indictment at common law, charging the defendants with having *unlawfully and with a strong band* entered the prosecutor's mill and expelled him from the possession, is good.

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WILSON
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Bedford, in support of the demurrer, contended that the indictment upon the face of it charged only a private trespass, and not a public breach of the peace indictable. It is laid down by *Hawkins* (a) that no indictment for a forcible entry lay at common law where the party had lawful right of entry; but that such indictment can only be maintained on the statutes (b). And though it has been since holden in the case of *The King v. Bathurst* (c) that an indictment lies at common law for a forcible entry into a dwelling-house; yet that has been adverted to in subsequent cases as the single exception to the general rule. To support an indictment at common law some specific violence constituting a breach of the peace must be charged on the record; and therefore where such facts are stated in the indictment as accompanying a forcible entry, the indictment may be maintained on account of the breach of the peace so stated, but not on account of the forcible entry itself. These principles are clearly established by the cases of *The King v. Bathurst* (c), *The King v. Storr* (d), and *The King v. Bake and others* (e). *Storr's* case was an indictment for unlawfully entering a man's yard, and digging the ground and erecting a shed, and unlawfully and with force and arms expelling the owner: The Court quashed it on the ground that the nature of the force used did not appear on the face of the indictment, and that nothing more than a common trespass could be implied from the words *vi et armis*. There *Aston J.* mentioned that he took *Mr. Justice Denison* to have said in the case of *The King v. Bathurst* "that *vi et armis* was *primâ facie* as good as *manu forti*:" and all the Court agreed that that case proceeded on the ground of it's being a forcible entry into a dwelling-house. But as the first count in the case of *R. v. Bathurst* charged the offence to be committed *manu forti* as well as *vi et armis*, if that had been sufficient, there would have been no necessity to resort to such a distinction. The other case of an indictment against *Bate* and fifteen others (f) was quashed on the same ground; because the actual force used did not appear upon the face of the indictment, so that the Court might see that it was such as amounted to a public breach of the peace: and there all the Court agreed that the mere number of persons

(a) 1 *Hawk. c.* 64. *f.* 1, &c.(b) Vid. statutes 5 *Ric. 2. c.* 8.; 15 *Ric. 2. c.* 2.; 8 *Hen. 6. c.* 9.; 31 *Eliz. c.* 11.; and 21 *Jac. 1. c.* 15.(c) *Sayer's Rep.* 225; and vide 3 *Burr.* 1699 1702. the same case referred to.(d) 3 *Burr.* 1698.(e) *Ib.* 1731. (f) *Ib.*

charged to be present made no difference. All the cases where the indictment has been sustained upon the words *manu forti*, without shewing what the force was, have been founded upon the statutes against forcible entry and detainer: and in those it has been holden sufficient for the indictment to pursue the words of the statutes. In a prosecution under those acts the principal object of the party is to obtain restitution of the premises, and therefore it partakes more of a civil remedy. But this is an indictment at common law, where the breach of the public peace is the gist of the offence, which ought to be apparent upon the face of the record. There are also good general reasons for not suffering parties to convert actions of trespass into indictments; for they thereby become witnesses in their own causes, and save the costs in case they do not succeed.

Walton contra. Though it may be admitted that the second and fourth counts cannot be supported, yet the first and third may, on the ground that charging the forcible entry to have been made *manu forti* is a sufficient allegation of an actual force used, amounting to a breach of the peace; more especially when it appears to have been committed, as is here charged, by twelve persons; for such a number, as *Hawkins* (a) observes, is of itself calculated to strike terror. Besides which, the fact charged is the expelling a man from the possession of his house, which in its nature implies some personal violence. This case differs from those cited, where indictments only alleging the offence to be committed *vi et armis* have been quashed; for *manu forti* implies something more than a constructive force in law. In the *Queen v. Dyer* (b), exception was taken to an indictment for a forcible entry into *land*, that it was not alleged to be *manu forti*, according to the words of the statute 5 Ric. 2. c. 8.; but the Court refused to quash it, saying that at common law a party was indictable for entering into land where his entry was not lawful, though there were no force; but that the statute forbids it even where the entry is lawful. In *Jopson's case* (c) the Court refused a similar application; though the indictment only charged that the defendants, five in number, and several others, unlawfully assembled to disturb the peace, and *with force and arms* unlawfully broke and entered a mine of black lead &c, and unlawfully took and carried away 60 pounds weight

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The King
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(a) Vid. 1 Hawk. c. 65. s. 1, 2, 4, 5.

(c) Mentioned in 3 Burr. 1702.

(b) 6 Mod. 96.

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of lead &c. Here the force is as apparent on the face of the indictment as it was there; for here it is stated that the defendants with a strong hand expelled the prosecutor from his house. It is true that the case of the *King v. Bathurst* turned in great measure upon the circumstance of the entry having been made into a dwelling-house: but the principle must extend equally to the present case; for there is no reason for saying that the breach of the public peace is more apparent in the one case than the other. As to the general impolicy of permitting the party grieved to be a witness in his own cause, it does not apply more strongly to this than to many other criminal cases.

Bedford, in reply, said that in *Jepson's* case an *unlawful assembly* was charged, which in itself was an indictable offence. That as to *Dyer's* case in *Modern Rep.*, being prior to the cases first cited and contradictory to them, it must be taken to have been over-ruled. That the words *manu forti* were no description of the force, but a mere qualification of the act, and had only the same effect as the terms *feloniously* or *unlawfully* in an indictment; which would not be sufficient to describe the offence if the fact stated appeared not to be felony or unlawful.

LORD KENYON Ch. J. It is perfectly clear that a mere trespass which is the subject of a civil action, and where the words *vi et armis* are introduced as matter of form, cannot be converted into an indictable offence. But there is no doubt but that the offence of forcible entry is indictable at common law, though the statutes give other remedies to the party grieved, restitution and damages; and therefore in an indictment on the statutes it is necessary to state the interest of the prosecutor: but I do not know that it has ever been decided that it is necessary to allege a greater degree of force in an indictment at common law for a forcible entry than in an indictment on the statutes. In the cases cited a distinction seems to have been taken between a forcible entry into a dwelling-house and a forcible entry into other kinds of property, and it has been said that a less degree of force need appear in an indictment in the former case than in the latter. But the simple question here is whether the facts stated in this indictment, if they be proved as laid, do not amount to an indictable offence? It is alleged that twelve persons with force and arms and with a strong hand violently entered into a certain mill and lands and houses and expelled the prosecutor; whether or not these facts will be proved is another question;

question; but if they be proved as laid, God forbid that it should not be an indictable offence! the peace of the whole country would be endangered if it were not so. It is said however that the number of the defendants in this case is not equal to that in one of the cases where the indictment was quashed, and where the Court said that the number of the defendants alone would not make it an indictable offence: but from what is there said it does not follow that the Court would have decided that the indictment could not have been supported, if it had charged the defendants with having committed the same degree of violence that is stated in this indictment. Therefore in determining that the first and third counts in this indictment may be supported, we shall not overrule any of the cases that have been cited, and we shall give effect to a part of the law that ought to be preserved, namely, that no one shall with force and violence assert his own title. The second and fourth counts are very properly abandoned by the prosecutor.

GROSE J. The second and fourth counts being given up, the only question before us is whether or not the first and third counts can be supported. I thoroughly agree with those cases in which it has been decided that an indictment at common law for a forcible entry may be maintained. I admit that there appears to be a little confusion in the different cases on this subject; in some it seems as if the words "manu forti" were considered to be of the essence of the offence, while in others it is said that they mean no more than vi et armis. But I am not aware of any case in which it has been holden that an indictment similar to those counts in the indictment now in dispute could not be supported. Then we must resort to principle: now it is here stated that at one time twelve persons with a strong hand entered into houses belonging to the prosecutor, and with a strong hand violently expelled him; this is clearly a public breach of the peace and the subject of an indictment. The words "with a strong hand" mean something more than a common trespass. Therefore I am of opinion that the first and third counts are good.

LAWRENCE J. Every indictment must charge sufficient to shew to the Court that the defendant has done that which in law is an indictable offence. And it has been settled in the cases alluded to that it is not sufficient in an indictment for a forcible entry to charge the defendant with having entered vi et armis, which is the degree of force that the law ascribes to every common trespass or entry on land, but that it is necessary to allege that degree

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of force and violence in fact which constitutes the offence. The question therefore in this case is whether or not the words "with a strong hand" do not imply that degree of force. The statutes use the words "with a strong hand" as describing that degree of force which makes an entry or detainer of lands criminal, and entitles the prosecutor under circumstances to restitution and damages. And in an indictment on the statute it is sufficient to state that the defendants entered "with a strong hand;" it being considered that those words imply that the entry was accompanied with that terror and violence that constitutes the offence. *Baude's case* (a) shews that those words are sufficient in an indictment on the statute. There it was charged that the defendant vi et armis ac manu forti expulit &c; and though several objections were taken to the indictment, it was not objected that a sufficient degree of force was not alleged to make it an indictable offence. So in *Rast. Entr.* 354. there is a count that the defendant manu forti entered &c. And this precedent is in a book of the greatest authority. Hence it appears that it was then thought that charging the entry to be manu forti was sufficient to constitute a forcible entry within the meaning of the acts of parliament: but as it is clear that in order to sustain an indictment on the statute it is necessary to prove such a degree of force as would amount to a public breach of the peace at common law, why may not those words in an indictment at common law satisfy the Court that the entry was attended with the same degree of violence? No particular technical words are necessary in such an indictment: all that is required is that it should appear by the indictment that such force and violence have been used as constitute a public breach of the peace; as is manifest from the cases cited, particularly that of *R. v. Bathurst and others*. There the indictment consisted of five counts: the first stated that the defendants with force and arms and with a strong hand entered a certain messuage with the appurtenances &c, concluding contra formam statuti; the three next counts were for a forcible entry into closes; the fifth count was for a forcible entry at common law into a dwelling-house; but in none of them, except the first, were the words "with a strong hand" used. All the Court agreed that the first count could not be supported on the statute, because it did not state what interest the prosecutor had in the house: but *Ryder Ch. J.* and *Foster J.* thought that it was good at common law, though *Mr. J. Denison* doubted, because it concluded

(a) *Cro. Jac.* 41.

against the form of the statute, and it had never been holden that indictments which were informal as indictments on the statutes could be supported at common law by rejecting such conclusion. The three next counts were considered as bad: but it was ruled that the fifth count was good: and *Ryder* Ch. J., speaking of the first count, said "The words "manu forti" are understood to import something criminal in it's nature; something more than is meant by the words "vi et armis." And there is a much more ancient case than that in which the same thing was said. In *Sty.* 135. exception was taken to an indictment for a forcibly entry, because the words manu forti were omitted, when *Rolle* Ch. J. said that those words should have been used "to distinguish this kind of entry from an ordinary trespass." So that he thought that those words imported a greater degree of violence than the common words in trespass "vi et armis." As therefore those words are inserted in the first and third counts of this indictment, I am of opinion that those counts are good, especially considering the number of the defendants; and that judgment must be given for the Crown on those counts.

LE BLANC J. Two objections have been taken to this indictment; 1st, That this is not an offence indictable at common law; and 2dly, that even if it be, the first and third counts of this indictment do not charge a sufficient degree of force to make it an indictable offence. The three cases that have been cited, two from *Burrow* and the other from *Sayer's Reports*, are decisive authorities to shew that an indictment for a forcible entry may be maintained at common law, provided the indictment charge the defendants with having used such force as constitutes a public breach of the peace. In the two cases in *Burrow* it was holden that the words "with force and arms" were not alone sufficient to make it an indictable offence at common law, for this reason chiefly, that that is the constant form of expression used in actions of trespass: but it seems to have been admitted that if enough is alleged in an indictment to impute actual force to the defendants, the indictment is good at common law. Now in this case there are other words besides "vi et armis," namely, "with a strong hand" and "unlawfully." My Brother *Lawrence* has observed that "with a strong hand" are the words used in the statutes; and I think that those words mean something more than "vi et armis," which are the mere formal words in an action of trespass. I am therefore of opinion that the allegation, that the twelve defendants with force

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and arms and with a strong hand unlawfully entered and expelled the prosecutor, does impute to the defendants a degree of force and violence sufficient to support this indictment. Consequently I concur in the opinion given by the Court that judgment must be given for the Crown on the first and third counts.

Judgment for the Crown on the first and third counts.

On a subsequent day in the term,

Lord KENYON Ch. J. said, We wish that the grounds of our opinion may be understood. We do not in the least doubt the propriety of the decision in this case the other day, but we desire that it may not be considered as a precedent in other cases to which it does not apply. Perhaps some doubt may hereafter arise respecting what Mr. Serjt. *Hawkins* says, that at common law the party may enter with force into that to which he has a legal title. But without giving any opinion concerning that dictum one way or the other, but leaving it to be proved or disproved whenever that question shall arise, all that we wish to say is that our opinion in this case leaves that question untouched, it appearing by this indictment that the defendants *unlawfully* entered, and therefore the Court cannot intend that they had any title.

Saturday,
Nov. 16th.

OLIVER and Another *against* AMES.

This Court will not discharge a defendant out of custody on filing common bail, on the ground that the plaintiffs at whose suit he was arrested were assignees under a commission of bankrupt sued out above three years ago against the defendant, under which they had received dividends. But they suspended the execution of the rule on the sheriff to bring in the body to give the defendant time to make an application to the Lord Chancellor for relief.

IN May 1796 a commission of bankrupt issued against the defendant, under which he was declared a bankrupt, and the plaintiffs were chosen his assignees, and have since made two dividends, of which the plaintiffs received their shares in common with the other creditors. After which, on the 23d of *October* last, they arrested the defendant for 100*l.*, being the residue of 130*l.* the amount of the original debt. And on a former day in this term

Lambe moved to discharge the defendant out of custody on filing common bail. He admitted that the Court of Chancery will in some cases permit a creditor who has proved his debt under a commission to wave his advantage under such commission, and proceed at law for the recovery of his debt: but he said that no case has gone the length of the present, where the assignees after possessing themselves of all the bankrupt's property and receiving dividends

they suspended the execution of the rule on the sheriff to bring in the body to give the defendant time to make an application to the Lord Chancellor for relief.

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under the commission have been suffered afterwards to proceed at law. And he observed that if the Court of Chancery would prohibit them on the ground of having made their election, this Court will not suffer them to arrest the person of the bankrupt. On the same principle, in the case of *Aylett v. Harford* (a), the Court refused to suffer a creditor, who had proved his debt and acquiesced under the commission above a twelvemonth, to resort to the bankrupt's bail in an action commenced before such commission issued.

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Espinasse opposed this in the first instance; and referred to the cases *Ex parte Ward* (b), and *Ex parte Dorvilliers* (c), to shew that the circumstance of a creditor being chosen assignee under the commission does not preclude him from proceeding at law against the bankrupt; though the Court of Chancery will not suffer a petitioning creditor to do so. At any rate he insisted that this was only a ground for an application to the Lord Chancellor and not for a summary application to a court of law, as was lately determined by the Court of Common Pleas in the case of *Hill v. Reeves* (d).

The Court said they would look into the case cited from the Court of Common Pleas; and on this day

Lord KENYON Ch. J. said that as that Court had referred the complaint of the defendant to the Court of Chancery, which was the usual forum for the decision of such questions, this Court would follow the same example. That it was a settled rule not to suffer a petitioning creditor to sue the bankrupt at law; but that in other cases the Court of Chancery would allow the (a) creditors reasonable time to make their election after they had proceeded under the commission. But that Court had precluded parties from pursuing their remedy at law after much less acquiescence than three years.

Therefore the Court discharged the present rule: but the plaintiff having ruled the sheriff to bring in the body, they suspended the execution of that rule in order to give the defendant an opportunity of applying to the Court of Chancery.

(a) 2 *Blac. Rep.* 1318.(b) 1 *Atk.* 153.(c) *Ib.* 221.(d) *Bos. & Pul. Rep.* 424.(e) *Vid. Ex parte Capot*, 1 *Atk.* 220, where

the Lord Chancellor permitted the plaintiff, one of the assignees of the bankrupt, to proceed at law, on refunding what he had received as dividends under the commission.

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Tuesday,
Nov. 19th.GLAZEBROOK, Clerk, *against* WOODROW, Clerk.

Plaintiff covenanted to sell to the defendant a school-house &c. and to convey the same to him on or before the 1st of *August* 1797, and to deliver up the possession to him on 24th *June* 1796; and in consideration thereof defendant covenanted to pay the plaintiff 120*l.* on or before the said 1st of *August* 1797: held that the covenant to convey and that for the payment of the money were dependent covenants; and that the plaintiff could not maintain an action for the 120*l.* without averring that he had conveyed or tendered a conveyance to the defendant.

IN covenant the declaration stated that by articles of agreement under seal made on the 10th of *March* 1796 between the plaintiff and the defendant, (after reciting that the plaintiff had established a grammar-school at *Warrington* in which he had many scholars, and for the purpose of conducting the said school with convenience had possessed himself of a piece of ground on which he had erected a building appropriated to instruction &c., and being about to leave *Warrington* had agreed with the defendant to sell to him not only his right title and interest in the said ground and building, subject to a yearly ground rent of 16*s.* and 6*d.* payable to *J. Blackburne* in fee, but to surrender to him the pupils he then had under his care so far as in him lay, together with all benefit arising therefrom, for the considerations thereafter mentioned,) the plaintiff covenanted and agreed to and with the defendant that he, the plaintiff, would on or before the 1st of *August* 1797 convey to the defendant his heirs &c. the said ground with the buildings thereon erected, subject as aforesaid, and the fixtures therein, for all the plaintiff's right title and interest in the premises, and would on or before the 24th of *June* 1796 surrender up the use and enjoyment of the said premises and deliver over as far as in him lay all the pupils he might then happen to have under his care to the care of the defendant, and all the profits arising from them, and also that he the plaintiff would in the meantime use his utmost endeavours with the parents and guardians of the children committed or to be committed to his care in *Warrington* to induce them to continue their children under the care and tuition of the defendant &c; and in consideration thereof the defendant covenanted and agreed to and with the plaintiff that the defendant his executors &c. would on or before the said 1st of *August* 1797 pay the plaintiff his executors &c. the sum of 120*l.* with lawful interest from the 1st of *January* next preceding the said 1st of *August*. The plaintiff then averred that in pursuance of the said articles he afterwards viz. on the said 24th of *June* 1796 surrendered up the use and enjoyment of the said ground with the buildings &c to the defendant who thereupon entered upon and became and was and from thence hitherto hath been and still is thereof possessed, and also then delivered over as far as in him lay all the pupils he then

had under his care and all the profits &c; and although the plaintiff had well and truly performed every thing else in the said articles contained on his part, yet protesting that the defendant had not performed any thing in the said articles contained on his part, the plaintiff averred that the defendant did not on the said 1st of *August* 1797 or at any other time before or since pay the said 120*l.* with interest &c. to the plaintiff, but wholly refused to pay the same &c; wherefore &c.

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To this the defendant pleaded, 1st, that from the time of making the said articles until and on the 1st of *August* 1797 he (the defendant) was ready to accept a conveyance of the said ground in the declaration mentioned with the buildings &c. for and during all the plaintiff's right title and interest in the same, and at the same time to pay the said 120*l.* in the declaration mentioned with interest &c, if the plaintiff would have made or procured any such conveyance or assurance, yet that the plaintiff did not on or before the said 1st of *August* 1797 or at any time since convey to the defendant the said ground with the buildings &c for and during all the plaintiff's right &c.; wherefore the defendant had not paid to the plaintiff the said 120*l.* &c. There was a second plea to the like effect; stating that the plaintiff had not tendered any conveyance of the premises &c.

To these pleas there was a general demurrer, and joinder in demurrer.

Yates in support of the demurrer. The question is whether the covenant to convey, and the covenant to pay the stipulated price, be dependant covenants, or whether they be mutual and independant covenants, for the breach of which the parties must respectively resort to their remedy by action. It may be admitted that if the performance of a covenant, for the breach of which the defendant is charged, depends upon a prior act to be done by the plaintiff, the non-performance of such prior act may be pleaded in bar of the plaintiff's action. But here the covenants are independant; and therefore it was not necessary in order to maintain the action for the 120*l.* for the plaintiff to aver the execution or tender of a conveyance on or before the 1st of *August* 1799; consequently the allegation of the non-performance of those acts by the defendant in his pleas is no bar to the plaintiff's recovery. It has been long settled that no precise form of words is necessary to make a covenant, precedent, mutual, or subsequent, but it depends upon the

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intention of the parties and the good sense of the thing. *Thorpe v. Thorpe* (a). It was there said that where the things to be performed by the parties respectively are to be done at different times, that shews that the covenants are not dependant one on the other, but that the parties look to different remedies to secure the performance of them. Now here the defendant was to be put in possession of the premises and of the pupils of the school on the 24th of *June* 1796, and it was not until the 1st of *August* 1797 that the conveyance was to be executed and the money paid. The defendant therefore has long ago had the advantage of the partial execution of the contract, by being put in possession of the school and of the emoluments arising from it, which is the material and substantial part of the contract. The same doctrine was laid down in *Campbell v. Jones* (b). There one, who had obtained a patent for an improved method of bleaching linen &c., contracted with the defendant in consideration of 250*l.* paid down and of 250*l.* more to be paid on a certain day or sooner, to instruct him in his art, and the defendant covenanted to pay the further sum on that day or sooner if the plaintiff instructed him before: there the Court held that the times stipulated for the performance of the respective acts being fixed, the one could not be said to depend on the other; and accordingly the plaintiff had judgment in covenant for the 250*l.*, without averring that he had given the defendant the necessary instruction, in respect of which the money was to be paid. If it be objected that here the words of the covenant shew a condition precedent; for that the defendant only covenanted to pay the money "*in consideration thereof*" &c, i. e., of all that the plaintiff had before engaged to do, the case of *Boone v. Eyre* (c) is an authority in answer to shew that those or the like expressions do not in themselves make a condition precedent, if on the whole the intention of the parties appears to have been otherwise. There the plaintiff had sold a plantation in *Dominica* and the negroes thereon to the defendant under certain covenants, in consideration of 500*l.* and a certain annuity for lives; and the defendant covenanted with the plaintiff that, "he the said plaintiff well and truly performing all the covenants in the said indenture of sale contained," the defendant should pay the said annuity: and in an action on the covenant for non-payment of the annuity the plaintiff

(a) *Salk.* 171.(b) *Ante*, 6 vol. 570.(c) 2 *Blac. Rep.* 1312.

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averred performance generally of all the covenants on his part; the defendant in answer pleaded specially non-performance by the plaintiff of certain covenants contained in the indenture of sale, as that he had no title, and had not delivered possession &c.: but the Court on demurrer gave judgment for the plaintiff, on the ground that those words did not make a condition precedent; but that the covenants were mutual and independant. Now that case cannot be distinguished on principle from the present; for there the annuity was in the nature of a payment for the estate, of which it was admitted that the plaintiff had not put the defendant in possession: whereas here the defendant has had the benefit of the estate, and has his remedy on the covenant for the non-execution of the conveyance.

Wood, contra, agreed in the general principle first stated, but contended that upon the plain sense and reason of the contract the conveyance and the payment were intended to be concurrent acts. The same day was named for the performance of both; and it would be unreasonable, merely because the defendant was put in possession of the premises, that he should be compelled to pay the purchase money before a title was made to him; for he might be evicted by an ejectment immediately after, and would be driven to his remedy in a court of equity. In the cases cited the respective acts of the parties were to be performed at different times: but here though the plaintiff was to do one act before, yet the material acts were to be done on, the 1st of *August* 1797, and the defendant only covenanted to pay the money on that day *in consideration* of the plaintiff having performed all that he had engaged to do on or before that day. This case is in effect the same as that of *Goodisson v. Nunn* (a), where the plaintiff having agreed to sell the defendant his estate for 210*l.* on a certain day, in consideration whereof the defendant covenanted to pay that sum on that day and on failure to pay 21*l.*, the Court held them to be dependant covenants, and that the plaintiff could not recover the 21*l.* without shewing a conveyance or at least a tender of one on his part.

Yates, in reply, said that this case was different from that of *Goodisson v. Nunn*, inasmuch as there no part of the consideration was performed by the plaintiff, and all was to be done at one and the same time: whereas here the material and beneficial part has

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been performed, namely, the putting the defendant in possession of the premises and of the emoluments arising from the school, and a different day was appointed for the performance of what was stipulated to be done by the defendant.

LORD KENYON Ch. J. The cases which have been mentioned are in my recollection; and although I have not the least doubt what the sense and justice of this case require to be done, yet if I found that I should thereby transgress any technical rule of law which had been established, I would not set up my opinion against the wisdom of those who are gone before me. But I am fully satisfied that what justice requires to be done in this case will not contravene any principle of law which has been established in those cases. The general rule, which governs them all, is that every man's agreement is to be performed according to his intent, as far as that is to be collected from the particular instrument. Now here the case is that the plaintiff, being in possession of a school, covenanted with the defendant to convey to him the good-will of it (if I may use the expression) and the building itself on or before the 1st of *August* 1797, and in the mean time he consented to put him in possession of the premises on some prior day: on the other hand the defendant engaged to pay him a stipulated price in consideration of all that the other had undertaken to do on or before the same 1st of *August*. And now the plaintiff who is to execute the conveyance, and who is also the person to pay for it, not having made it, or made a tender of it to the defendant, nevertheless calls upon him by this action to pay the consideration-money. The very statement of such a claim is enough to refute it. If these be not dependant covenants, it is difficult to conceive what covenants are so. The very substance of the consideration to entitle the plaintiff to receive the money was the making of the conveyance required; and it is admitted that he has not done it: that makes an end of the question. The case of *Campbell v. Jones* was very different from the present; for there the instruction to be given was not to be, and could not in the nature of the thing be, performed at the same time with the payment of the money by the defendant, for which a certain time was limited: whereas no time was limited for giving the instruction. But here the parties have stipulated for the conveyance and the payment to be performed at the same time. And if we were to hold otherwise in such a case as the present, the greatest injustice might be done; for supposing, in the instance of a trader who had entered into

such a contract for the sale of an estate, that between the making of the contract and the final execution of it he were to become a bankrupt, the vendee might be in the situation of having had payment enforced from him, and yet be disabled from procuring the property for which he had paid. The injustice of such a procedure is too manifest to be insisted upon further.

GROSE J. The question is whether these covenants be dependant or independant; and that must be collected from the apparent intention of the parties to the contract. There is certainly some confusion in the books on this subject, some of the older cases leaning to construe covenants of this sort to be independant, contrary to the real sense of the parties and the true justice of the case. But the later authorities convey more just sentiments; and the case of *Kingston v. Preston* (a) was the first strong authority in which they prevailed in opposition to the former. Nothing indeed could exhibit the doctrine which ought to prevail in these instances in a stronger point of view than the circumstances of that case; for there, if the plaintiff had prevailed, the most flagrant injustice would have been committed. The fact was that the defendant, being possessed of a very large stock in trade, covenanted with the plaintiff to assign the same to him and another person at the end of a twelvemonth at a fair valuation, when deeds of partnership were to be executed between the two last persons, and the plaintiff covenanted that he would *at and before* the sealing and delivery of the deeds procure good and sufficient security to be given to the defendant and to be approved of by him for the payment of a certain stipulated sum by monthly instalments; and there the attempt was by the plaintiff to get possession of the whole stock in trade of the defendant to a great amount, without giving him any security at all, to his inevitable ruin. But the absurdity and injustice of the thing struck the Court so forcibly that they said it could never have been the intention of the parties that the defendant should surrender his whole fortune into the plaintiff's hands without the previous security which he had insisted upon, and that he should solely rely upon his remedy by action for the breach of the plaintiff's covenant: they therefore gave judgment for the defendant. I have since found that that was not the first case where those sentiments began to be entertained; for it appears from a late publication of Reports from

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(a) Cited at large in *Jones v. Barkley*, Dougl. 689.

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the manuscripts of Lord Chief Justice *Willes* that in a case of *Thomas v. Cadwallader* (a) his Lordship noticed the injurious tendency of the doctrine which had before that time prevailed in these cases; and seemed very desirous that the governing rule should be so to construe such covenants as that the real intention of the parties should be carried into effect, to attain the true justice of the case. This was afterwards done in the case of *Kingston v. Preston*; and that has since been settled to be the rule in many cases. Now here the plaintiff covenanted to convey on or before the 1st of *August* 1797, though the defendant was to be put in possession before. And the reason why the conveyance was not to be executed before is obvious; because that was the day on which the money was to be paid. Then what is the true justice of this case and the evident meaning of the parties? It is plainly this, that the execution of the conveyance and the payment of the money should be concurrent acts, and even the payment of the interest was to be deferred till the 1st of *August* though it was to run from the 1st of *January* preceding. Then there is an end of the question; because it is not pretended that the plaintiff had conveyed or was ready to convey at the time. How far the determination in *Boone v. Eyre* militates against the principles I have laid down may be a matter of doubt; but the intention of the parties is or is assumed to be the governing principle of all the late determinations.

LAWRENCE J. The plaintiff's case is attempted to be maintained on the supposed intention of the parties and on authorities. 1st, On the intention of the parties, it is said that where one promises to another to perform a certain thing in consideration of several matters to be performed by himself, he is entitled to maintain an action against that other for non-performance of his engagement, if he himself has performed any one of the things stipulated by him to be done. Therefore that in this instance the plaintiff, who has covenanted to put the defendant in possession and to convey the premises to him in consideration of a certain sum, is entitled upon performance of one of those things, to maintain his action for the consideration money. But it is clear that if the agreement appear to be that the whole of what the plaintiff engaged for was to be done before the money was to be paid, it will not follow that, because a part only has been performed, he can recover the money, and leave the de-

(a) *Willes's Rep.* 496.

fendant to his remedy upon the agreement for the breach of the other part. For whether one promise be the consideration of another, or whether the performance and not the mere promise be the consideration, must be gathered from, and depends entirely upon, the words and nature of the agreement. Now suppose the terms of the agreement had been that the plaintiff was to put the defendant in possession of and to convey the premises to him on or before the 1st of *August*, and that upon the defendant's being put in possession and the conveyance made to him he was to pay the purchase-money on or before that day; there could be no doubt but that the conveyance must be made as well as the possession delivered up before any right to the purchase-money would accrue. Whatever the form of the words may be, if we can collect from the face of the instrument that the whole was to be performed by the plaintiff before the money was to be paid, nothing short of performance of the whole can enable him to sustain this action for the money. But authorities have been cited to shew that, where a certain time is fixed for the payment of money in consideration of certain acts stipulated to be done, a partial performance of such acts is sufficient to found an action for the money: but the cases cited do not warrant so general a conclusion. Part execution is only a circumstance from whence the intention of the parties is to be collected: but nothing is to be inferred from it in favour of the plaintiff in this case; for though the defendant was to be put in possession in *June* 1796, and the money was to be paid in *August* 1797, yet as that also was the time fixed for the execution of the conveyance, it is plain that the defendant did not intend to part with his money till his title was secure. In the case of *Boone v. Eyre* (a) the plaintiff had sold to the defendant an estate in *Dominica*, with the negroes, under the usual covenants for a good title and quiet enjoyment and further assurances, in consideration of a sum in gross and a certain annuity for lives, which the defendant covenanted to pay, "he the plaintiff well and truly performing all and singular the covenants clauses recitals and agreements in the said indenture of sale contained:" and in bar to an action of covenant for the arrears of the annuity, besides assigning breaches of specific and partial covenants, the defendant by his 4th plea pleaded "that the

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(a) This was cited from the case reported in 1 *H. Blac.* 273. note a. and also from a MS. note which is referred to by Lord *Kenyon* in giving judgment in *Campbell v.*

Jones, ante, 6 vol. 573., and not from the case reported by Mr. Just. *Blackstone*, 2 vol. 1312.

plaintiff

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plaintiff at the time of making the said indenture had not in himself full power true title and good and lawful authority to bargain sell and release the said plantation, and negroes &c. *in manner and form as in the said indenture mentioned.*" The Court said it would be strange if such a defence were to be allowed, when if any one negro on the plantation were proved not to have been the property of the plaintiff, it would bar his action for the annuity. The judgment of the Court there went on the ground that, in the form the breaches were assigned the plea did not necessarily go to the whole of the consideration. But if the plea had been that the plaintiff had no title at all to the plantation itself, I do not know that it would not have been holden sufficient. So in *Campbell v. Jones*, the defendant against whom the action was maintained had the whole of what was to be conveyed to him; and the substantial part of the consideration was the right of using the method of bleaching described in the patent; though in addition to that the plaintiff had also engaged to instruct him in the use of that method; the not doing of which might be recompensed in damages. That instruction might consistently with the plaintiff's covenant as well be given after as before the time specified for the payment of the money, and therefore it was not necessary to be averred in an action to recover the money. Therefore neither upon the reason of the thing nor the authorities is the plaintiff entitled to recover.

LE BLANC J. This case falls within the rule first laid down in *Kingston v. Preston*, that no person shall call upon another to perform his part of a contract until he himself has performed all that he has stipulated to do as the consideration of the other's promises. This rule (I think) applies to every case of a sale of property, where one engages to convey on a certain day, and the other to pay at the same time; and this, whether the one be stated in terms to be in consideration of the other or not. In neither case will the Court compel one party to perform his part until the other has done or has offered to do his own. This is the case of a covenant for the sale of a school-house, where the plaintiff covenanted to convey on or before a certain day, and the defendant on or before that day covenanted to pay him. The payment therefore is the consideration for the conveyance, and cannot be enforced till that be made or at least offered to be made by the plaintiff. But an attempt has been made to bring this case within the distinction taken in some of the cases;

where one party having had the advantage of all the material part of the agreement, the other has been permitted to sustain his action for the consideration, although there may not have been a literal performance of other parts. Thus in *Boone v. Eyre*, the substantial part of the agreement being the conveyance of the property in respect of which the annuity was to be paid, the Court held it to be no answer to an action for the annuity to say that the plaintiff had not a good title in some of the negroes which were upon the plantation, because all the material part of the covenant had been performed; and the plaintiff had a remedy upon the covenant for any special damage sustained for the non-performance of the rest. So in *Campbell v. Jones*, the material part was the conveyance of the patent right, and that being performed the Court held that the giving of the instruction concerning the proper use of it, which might be given at any time afterwards, need not be averred in order to sustain the action for the recompence; but that a breach of that part of the agreement might be compensated in damages. So here the material part of the covenant being the conveyance, the plaintiff cannot entitle himself to the money until he has shewn that every thing was done which he had undertaken to perform on his part as the consideration of that payment.

Judgment for the defendant (a).

(a) See Mr. Serjt. Williams's note to the case of *Portage v. Cole*, 1 Saund. Rep. 320.

The KING against WARNER.

Wednesday,
Nov. 20th.

THE defendant was indicted at the Quarter Sessions for the county of *Essex* for not taking upon him the office of overseer of the poor of the parish of *Mistley* in that county, to which the indictment stated that he was in due manner nominated on the 16th of April 38 Geo. 3. The indictment having been removed into this Court by certiorari, the defendant pleaded not guilty; and the cause was tried at the last Spring Assizes at *Chelmsford* before *Perryn B.* when it was insisted on behalf of the defendant that he was exempted from serving the office by reason of his holding another office, that of coal-meter at *Maningtree* within the port of *Harwich*, under an appointment from the commissioners of the customs by deputation; the duties of which office were (it was said) incompatible with the office of overseer of the poor. And he also

An officer of the customs is exempted from serving the office of overseer of the poor, though he has not his writ of privilege at the time.

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relied on the clause of exemption in the patent under which the commissioners of the customs were appointed by the Crown, wherein it is stated that “to the intent that the said commissioners may be better enabled to attend the execution of their commission we do hereby grant declare and ordain that you our said commissioners *and all officers of the customs, as well those appointed or authorized by letters patent, or by constitution or warrants from the commissioners of our treasury &c, as those officers which are or shall be appointed or deputed by you our said commissioners in or for the management of our said revenue,* shall not be compellable to serve on any jury, or to appear and serve at any assizes or sessions, *or to serve any parish or other public office whatsoever civil or military;* hereby requiring and commanding all mayors, sheriffs, justices of the peace &c, and all other our officers and subjects whatsoever whom it may concern to take notice of this our royal pleasure at their peril &c.” It appeared in evidence that the duty of a coal-meter is to weigh and measure the several sorts of coals culm and cinders, upon which certain duties are imposed by several acts of parliament, imported or landed at *Maningtree*; and which appeared to be about 12,000 chaldron in a year; which was to be done by the defendant and four others; and that the necessary attendance of the defendant rendered it impossible for him personally to execute the office of overseer. It was also proved that there was no necessity for appointing the defendant overseer, inasmuch as there were many other substantial householders in the parish capable of taking the office.

It was said in answer, by the counsel for the prosecution, that the King could not by his prerogative exempt the defendant from serving the office of overseer, which was an office created by statute; and with regard to the supposed incompatibility of executing the two offices, that he might serve the office of overseer by deputy.

The learned Judge over-ruled the objections, and the defendant was found guilty.

The Attorney General obtained a rule in *Easter* term last calling on the prosecutor to shew cause why a new trial should not be granted, on the ground that the defendant was exempted from serving the office in question; which exemption (he said) extended to all revenue officers, as officers of the Court of Exchequer. *Cawthorne v. Campbell*, 1 *Anstr. Rep.* 205. 216. That the practice of that Court was, upon application from any of these officers,

officers, to grant them a writ of privilege of course. That such writ might be granted as well under the Great Seal as by that Court. *Raymond v. The Parish of St. Botolph*, 2 Chan. Rep. 196. But it was immaterial whether such a writ had actually issued in this case at the time of the trial, as the exemption existed before by virtue of the officer's appointment and the King's letters patent granting the exemption to all the officers of the customs. That in truth the writ of privilege itself was founded upon an assumption of a pre-existing right of exemption. He said that this prerogative of the Crown was recognized in the case of *Bishop v. Lloyd* (a): and though that was the case of an exemption claimed from serving a common law office, that of headborough, yet that was not the ground of the adjudication; the Court there not taking any distinction between common law and statute offices. And he observed that the case of *Raymond v. The Parish of St. Botolph* was a case of exemption from being overseer of the poor.

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Lord KENYON C. J. referred to the case of the Vicar of *Dartford* (b), where a writ of privilege was granted by the Court to the defendant to exempt him from serving the office of expeditor to the commissioners of sewers; though it was insisted that the office might be served by deputy.

The case stood over for argument till this term; and when it was called on,

Bayley Serjt. and *Trower* for the prosecution said that since the rule was obtained the defendant had obtained his writ of privilege from the Court of Exchequer, which, they admitted, now exempted him from serving the office; and therefore the only contest now was for the costs of the trial. And these, they contended, the defendant ought to pay, as the conviction was proper at the time; for that the clause in the letters patent would not protect him without the writ of privilege.

The Attorney General (who was to have been assisted by *Shepherd* Serjt., *Garrow*, the *Common Serjeant*, and *Pooley*,) resisted this; contending that the conviction was illegal; and that therefore the defendant was entitled of right to a new trial without payment of costs. He observed that the clause of exemption alluded to, as it now stands in the commission, was settled by Sir *John Treby* and Lord *Somers* then Attorney and Solicitor General; and said that the writ of privilege did not confer, but presupposed, the right of exemption. That there were in fact two writs, the one the writ

(a) *Bunb.* 255.

(b) 2 *Str.* 1107; see also *Dr. Lee's case*, 1 *Ventr.* 105. S. P.
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of privilege, the other the writ of supersedeas of privilege; the first of which sometimes issued before the party was proceeded against in order to compel him to take an office, and was therefore rather *quia timet*; the other was granted where privileged persons have been proceeded against. He was stopped by

The Court, who said that they would not do any thing which would operate as a punishment upon the defendant, when it clearly appeared that he was privileged at the time from serving the office, and therefore had been guilty of no offence in refusing to take it; although he happened not to have his writ of privilege at the trial. It was enough that he was in a condition to have his writ of privilege at the time; and having since obtained it there was an end of any further argument upon the case, and

Lord KENYON C. J. added; Though I doubted at first to what branch of the prerogative this power of exemption was to be referred, yet upon looking into the authorities, and especially the case of *Bishop v. Lloyd* (a), I am satisfied that it is well founded. And I feel myself greatly strengthened by finding that it was upheld by two such great Judges as Sir *Thomas Pengelly* and Sir *John Comyns*; by the latter of whom it is said that the form of the writ of privilege as now used was drawn. In point of practice I have found other exemptions claimed and allowed, though the origin of them may not now be known. The first time I attended on the *Chester Circuit* as Chief Justice of *Chester*, an old instrument was brought for my signature, according to custom, in which the inhabitants of the town of *Nantwich* claimed an exemption from serving on juries. I signed the instrument, because I found it had been regularly signed for above two centuries back by my predecessors in the office, some of whom, particularly President *Bradshaw*, could not be suspected of being very desirous of stretching the prerogatives of the Crown.

GROSE J. said he was not satisfied that even the other ground of objection to the verdict, upon the incompatibility of the offices, was not well founded (b).

LAWRENCE J. referred to the case of the *Mayor of Norwich v. Berry* (c), where it was holden that an attorney of the court was privileged from serving the office of sheriff in a corporation of which he was a member, though it did not appear that he had taken out

(a) *Bunb.* 255.

(b) *Vid. Rex v. Rice*, 3 *Keb.* 627. *Abdy's* case, *Cro. Car.* 585; *Com. Dig.* tit. *Off.*

cer. p. 6.

(c) 4 *Burr.* 2109.

his writ of privilege at the time. He also referred to 2 *Inst.* 130. where it is said that "If a man have a charter of exemption and shew it to the sheriff, yet notwithstanding he may return him, for the sheriff is not to judge of his charter, nor to allow or disallow thereof: but if he will have the effect of his charter, he must sue out a writ of allowance of this charter and deliver the writ to the sheriff, and shew his charter to him: and then if the sheriff return him, he may have his action on the case against the sheriff." From this the purpose of a writ of privilege may be collected, that without it the officer is not bound to take notice of the privilege; but it does not follow that the Court will not take notice of the privilege when it is shewn to them, though the writ be not taken out.

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Rule absolute for a new trial (a).

But it was understood that no further proceedings would be had.

(a) In *Gerard's case*, 2 *Blac.* 1126. which was the case of an attorney claiming privilege from serving in the militia, *Blackstone J.* said "It was universally agreed and was expressly resolved by all the Justices in the cases of *Heaton* and *Evingdon* that privilege extends to all cases of personal service, though imposed by acts of parliament, and in the most comprehensive words." And reference is there made to *Off. Brev.* 162. to instance such exemption from serving the office of

overseer of the poor. But in the principal case it was holden not to be altogether a personal service, because it might be commuted for a sum of money. See *Rex v. Clarke*, ante, 1 vol. 679; and *R. v. Clarke*, 1 *Sid.* 272. in what respect the prerogative of the Crown to grant exemptions must be qualified; namely, that there remain a sufficient number of persons to execute the office.

The KING against The Inhabitants of LAINDON.

Wednesday,
Nov. 20th.

TWO Justices removed *J. Claydon* from *East Horndon* in the county of *Essex* to *Laindon* in the same county. The Sessions on appeal confirmed the order, subject to the opinion of this Court on the following case.

The pauper, being legally settled at *Laindon*, went into the parish of *Ingrave* in *November 1792*, and after being one month upon trial with *J. Mander* a carpenter in *East Horndon* he entered into the following unstamped written agreement, witnessed and subscribed as under; "*November 20th 1792. I John Mander do hereby agree with J. Claydon to serve me three years to learn the business of a carpenter; the first year to have 1s. 2d. per day; the second year to have 1s. 6d. per day; the third year 1s. 10d. per day;*

A defective contract of apprenticeship cannot be converted into a contract of hiring and service so as to give the apprentice a settlement as a yearly servant by serving under it. — Whether a contract be a contract of apprenticeship or of hiring and service must

depend on the intention of the parties, which is to be collected from the whole of their agreement. — A contract of apprenticeship may be formed without using the term "apprentice." — Parol evidence may be received to explain a written instrument.

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witness my hand; *J. Claydon, J. Mander*; witness *Robert Beles*."

The pauper proved that at the time of signing the above agreement he agreed to give *Mander* the sum of three guineas as a premium to teach him the said trade, and paid *Mander* 1*l.* 15*s.*, which with 1*l.* 8*s.* due for wages during the month of trial made the three guineas; and that he was not to be and was not employed in any other work than that of a carpenter. The pauper worked with and served *Mander* under this agreement the whole three years, and slept the last forty nights in the parish of *East Horndon*, and considered himself as an apprentice under the said agreement; but he thought himself at liberty to leave his master if he used him ill. The counsel for the appellants objected to the parol evidence, explanatory of the above written agreement, being received, which objection was over-ruled by the Court.

Trower and *Wingfield* in support of the order of Sessions. It might be sufficient to observe in the beginning that no facts are stated to shew that the order of Sessions is wrong; the case only discloses evidence, not facts. But if this Court will go into the question as it arises on this state of the case, it appears that the pauper gained no settlement in *Laindon*, it being evident from the whole of the case that the pauper went to live with *Mander* as an apprentice and not as a yearly servant; and then the general rule applies, that if the pauper could not gain a settlement as an apprentice because the indentures were not stamped, he could gain no settlement as a yearly servant. By the written agreement (if it were properly received in evidence, though not stamped as an agreement,) the pauper was "to learn the business of a carpenter," which of itself implies a contract of apprenticeship. At the same time he also paid a premium to his master to teach him the trade; and it was also agreed that he was not to be employed in any other work than that of a carpenter. And though in *R. v. Little Bolton* (a) the Court said they could only consider those contracts to be contracts of apprenticeship where the word *apprentice* was used, yet the inconvenience of that determination was soon felt, and a contrary rule was adopted the next year in *R. v. Highnam* (b), where it was decided that it must depend on the intention of the parties in each particular case, to be collected from all its circumstances, whether an apprenticeship or a service as a yearly servant were the object of the parties, and if the former that it could not be con-

(a) *Cald.* 367.(b) *Ib.* 371 n.; and 1 *Const's Bott.* 495. pl. 689.

verted into a service. With regard to the objection, stated at the close of the case, to the reception of the parol evidence; that evidence was properly received as explanatory of the written agreement and not contradicting it. *R. v. Scammonden*, ante, 3 vol. 474; and *Filmer v. Gott*, 7 Bro. P. C. 70. At all events the fact of paying the money, which was given by the apprentice as a premium, was legally received in evidence, because that was a collateral fact. So also was the fact of the pauper's never doing any service out of his trade, which of itself explains the nature of the contract between the parties.

Pooley and Raincock contra. Even admitting that if the pauper went into the service of *Mander* as an apprentice he did not gain a settlement in *East Horndon*, on this state of the case it may fairly be collected that he went there as a servant for three years at different wages in each successive year. And if so, the written agreement was properly received in evidence, because of the exception (a) in the statute 23 Geo. 3. c. 58., respecting stamps on agreements, "that the act shall not extend to any memorandum or agreement for the hire of any labourer, artificer, manufacturer, or menial servant." The only expression in this agreement, from which an apprenticeship can be inferred, is that, "to learn the business of a carpenter:" but that alone is not sufficient to warrant such a conclusion, especially as there is another expression, "to serve," equally strong to shew that service as a servant was the object of the parties. In *R. v. Coltishall* (b) the pauper was to be taught the trade of a bricklayer, notwithstanding which it was holden that he gained a settlement as a yearly servant. There too was something in the nature of a premium; for the pauper was to receive less wages on account of his being taught a trade. If the circumstance of paying a premium were sufficient to prevent the pauper gaining a settlement as a yearly servant, that would equally apply to the case of waiters at an inn, who generally give a premium to the master on being taken into the inn. Then if the written agreement were properly admissible in evidence, the parol evidence ought not to have been received, because it tended to contradict the written agreement. And the opinion of the pauper, that he was an apprentice, was equally inadmissible; as that was merely his opinion on a question of law. But even if the Court should be

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(a) Sect. 4.

(b) Ante, 5 vol. 193.

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of opinion on the whole that this was intended by the parties to be a contract of apprenticeship, still as the pauper was not retained eo nomine as an apprentice, he gained a settlement in *East Horddon* by serving there more than a year. This was the very point in the case of *R. v. Little Bolton*, which was decided after great consideration and a review of all the prior determinations: nor was the authority of that case shaken by the subsequent case of *R. v. Highbury*; for that was decided purely on the ground of fraud; Lord *Mansfield* saying, "It is manifest even on the face of the written agreement that a fraud on the revenue was intended." This precise question therefore having been already determined in *R. v. Little Bolton*, it is better to adhere to that decision, which has been acted upon by the magistrates ever since, than to introduce another rule for their guide, which may itself be again changed at some future period (a).

Lord KENYON Ch. J. The two justices who made this order of removal, and the justices at the Sessions who confirmed it, were of opinion that the pauper was not hired to serve *Mander* as a yearly servant, but that the relation which was created between them was that of master and apprentice. The opinions of the magistrates ought not indeed decidedly to influence our judgment, as they have referred the case to us: but when a certain opinion has gone abroad founded on the decisions of this Court, upon which magistrates have been acting, it ought not lightly to be departed from. The first question that arises in this case is on the admissibility of the parol evidence. This parol evidence was not offered to contradict the written agreement, but to ascertain an independent fact; and I think it was properly received in evidence. That being so, the case appears to be shortly this; in consideration of three guineas paid by the pauper the master undertook to teach him the business of a carpenter, and the pauper was to serve three years. I am sorry that nice distinctions were ever taken in the determination of cases on this subject: but notwithstanding those little differences, we must consider the whole class of decisions on this point, and extract the principle from

(a) The counsel in support of this rule also wished to object to the original order of justices, because it only stated that it was made "on complaint," without saying "on the complaint of the churchwardens and overseers &c.:" but the Court said they ought not to be permitted to take a formal objection to the order now when both parties had agreed, by drawing up the special case, to take the opinion of the Court on the merits.

them. It is admitted in all of them that if two persons intend to enter into the relation of master and apprentice, and owing to some circumstance the relation of apprenticeship is not duly constituted as if the indentures be not stamped, this shall not change the condition of the parties: if they cannot avail themselves of the consequences of the condition in which they intended to stand, they shall not be put into another condition in which they did not mean to place themselves. But when it is urged that this relation can only be formed by using the term "apprentice," it may be observed that the argument would lead to an absurd consequence; for then if the word "clerk" were used in regular indentures of apprenticeship, the clerk could not gain a settlement by serving under the indenture, merely because he was not retained *eo nomine as an apprentice*: but it would be a disgrace to our laws if we were obliged to decide according to words without considering their meaning. It was very properly said by Lord *Hardwicke* that there is no magic in words: and he said this, not as a discovery just then made by him, but as a maxim that was handed down to him from his predecessors. If the relation of master and servant be created by the contract of the parties, though they do not use the very words "master and apprentice," yet if they use words tantamount, it is sufficient. In this case a premium was paid by one man to another, who engaged to teach him a trade: now what is that but an apprenticeship? The term "apprentice" is taken from the *French* word "*apprendre*" to learn. Unfortunately Lord *Mansfield* did not adhere to his first opinion in *R. v. Little Bolton*: but even when he gave his second opinion in that case, he took it for granted that the rule remained unshaken, that if the parties intended to create the relation of master and apprentice and it were not legally created so that the apprentice could not gain a settlement as such he could not acquire a settlement as a yearly servant. And in the subsequent case, *R. v. Highnam*, Lord *Mansfield* adopted the opinion he had first given in *R. v. Little Bolton*, conformably to all the other cases. Therefore we may rely on this last case; and if it be not distinguishable from that of *R. v. Little Bolton*, it is sufficient to say that it is subsequent to it; and that the case of *R. v. Little Bolton* is an anomalous case. When we find the current of authorities one way, I should be sorry that a little inadvertence in the Court in the decision of one case only should be supposed to break in upon the general rule; for the case of *R. v. Coltishall*, which has been cited, is distinguishable from

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this class of cases; there by the agreement of the parties the pauper "was to do any work that the master set him about (a)." I am therefore most clearly of opinion that in this case the parties intended to form the relation of master and apprentice, and that as that relation was not legally constituted so as to give the latter a settlement as an apprentice, the relation cannot be converted into that of master and servant so as to give him a settlement as a yearly servant. And I think we should do infinite mischief if we were to overturn that which has been so long a settled rule.

GROSE J. No doubt can be entertained on the first point in the case respecting the parol evidence; that evidence was not produced to contradict, but to explain, the written agreement; and therefore it was properly received in evidence. But the difficulty is to reconcile the decision in *R. v. Little Bolton* with that in *R. v. Highnam*. In the former case, which has been chiefly relied upon here in the argument, it is to be observed that Lord Mansfield adopted the general rule that an intended apprenticeship shall not be converted into a service as an hired servant for a year, though he also said it would not be considered as an apprenticeship unless the pauper were retained *as an apprentice*. Now it is stated in this case that in effect the pauper was to be an apprentice; an apprentice is a person who by contract is to be taught a trade, in contradistinction from a person who engages to serve another person generally. Here the pauper was "to learn the business of a carpenter," which words as clearly evince it to have been the intention of the parties that he should be an apprentice as any other words that could have been used. But, as there were no indentures of apprenticeship executed, the pauper could not acquire a settlement as an apprentice; and then the general rule applies that he gained no settlement as a yearly servant.

LAWRENCE J. The first question raised by the counsel in support of the rule is that the Sessions ought not to have received the parol evidence, because it contradicted the written agreement: but it was not offered for that purpose but to ascertain a fact collateral to the written instrument, in order to explain the intention of the parties, the instrument being in some measure equivocal. That fact being established, the case was this; on the one hand the pauper paid a premium to the master and was to receive certain wages, and on the other hand the master engaged to teach him the

(a) See also *The King v. The Inhabitants of Hitcham*, Burr. S. C. 489.

business of a carpenter: then the question is whether or not by this agreement the parties were to stand in the relation of master and apprentice, of which (I think) no doubt can be entertained. In the case of *R. v. Little Bolton*, Lord Mansfield only went thus far, that it must be collected from the words of the instrument whether or not the party is to serve as an apprentice: his Lordship could not mean to say that a contract of apprenticeship could not be formed so as to give a settlement to the party serving under it without the introduction of the word "apprentice." With regard to the instance put at the Bar of servants at inns, it is to be remembered that they do not pay their money in order to learn a trade, but as a premium to the master to let them have the perquisites of that situation: but in the case of a trade, the relation of apprenticeship is created for the very purpose of the party being instructed in that trade; the two cases do not bear the smallest resemblance to each other. Therefore there does not appear to me to be any reason for shaking the authority of the case of *R. v. Highnam*, especially as the great body of cases support it. It is much to be lamented that settlement cases should ever have been determined on nice distinctions; it would be better to decide them on some general rule that every person who reads may understand it.

LE BLANC J. On the first question that was made, it is sufficient to say that I entirely agree with the opinion given by the Court that the parol evidence was admissible, as evidence of a fact collateral to the written instrument. With respect to the other question, I am inclined to adhere to the principle recognized in all the cases, that where the contract itself clearly appears to have been intended as a contract of apprenticeship and not as a contract of hiring and service as a servant, it shall not, if defective as a contract of apprenticeship, be converted into a contract of hiring and service so as to give the party a settlement as a servant. And if it be supposed that the case of *R. v. Little Bolton* broke in upon that doctrine, I should rather be disposed to adhere to the general principle than to the decision in that particular case: but I do not think that the Court intended to decide in that case, that every contract of this kind must be considered as a contract of hiring and service unless the specific term "apprentice" be used. If by the terms of the contract the master, in consideration of a premium, engage to teach the other party his trade or art, it is the same as if he agree in express words to receive the other party *as his apprentice* and to teach him his trade. But this case is distinguishable from that of *R. v.*

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Little Bolton in that which forms a material part of a contract of apprenticeship; there no premium was paid, which was relied upon in many of the cases as a circumstance to shew that the parties only intended to form a contract of hiring and service. Now what is the present case; the master in consideration of a premium engaged to teach the pauper the business of a carpenter, and the pauper agreed to serve the master three years *to learn* that business: what is such an engagement but a contract of apprenticeship? and though it is not a perfect contract of apprenticeship in consequence of the agreement not being properly stamped, still according to the principle in all the cases such a defective contract shall not be converted into a contract of hiring and service. I am therefore of opinion that the pauper gained no settlement by serving under this contract.

Both orders confirmed.

STAINES Knight *against* PLANCK.

Thursday,
Nov. 21st.

If A. give a warrant of attorney to B. to confess a judgment immediately with a defeazance that judgment shall not be entered up until a subsequent day on a contingency, and A. become bankrupt before that day, though B. afterwards enter up judgment on the happening of the contingency, he cannot prove this debt under B.'s commission.

ON the 14th of June 1797 the defendant executed a warrant of attorney, authorizing the plaintiff's attorney to enter up a judgment against him *in an action of debt for 300l. borrowed* at the suit of the plaintiff, with a defeazance under written; in which (after reciting that two attachments had been issued against the plaintiff (the sheriff of *Middlesex*) in two actions brought against the defendant, one at the suit of *W. Winchester*, and the other at the suit of *Ronmore* and others, and that the defendant had proposed to pay the damages and costs in those causes on or before the 26th of June 1797) it was stated that previous to the execution of the warrant of attorney it was agreed that no judgment should be entered up thereon or execution issued against the defendant unless default should be made in payment of the damages and costs in the said actions on or before the said 26th of June; but, in case the defendant should make default in payment of the said two debts or either of them at the said time, then the plaintiff (the sheriff) should be at liberty to enter up judgment thereon and sue out execution for such money as should then be due for damages and costs sheriff's fees and all other incidental charges. On the 22d of June 1797 the sheriff was obliged to pay the debts and costs on the attachments, amounting to 67l. 10s. On the same day a commission of bankrupt issued against the defendant on an act of bankruptcy

ruptcy committed on the 18th of *June*. In *Trinity* term 1797 judgment was entered up on the warrant of attorney; in that year *Trinity* term began on the 16th of *June*, and judgment was not actually entered up until the 24th of *August*: but the roll was not carried in. On the 26th of *September* last the defendant was taken in execution upon that judgment, and to obtain his enlargement he paid 76*l.* 11*s.* 6*d.*; and he applied to this Court for a rule calling on the plaintiff to shew cause why that sum, in the hands of the sheriff of *Middlesex*, should not be returned to him, on the ground that this debt should have been proved under his commission, he having obtained his certificate in *May* last.

Lawes now shewed cause against that rule. The question is whether or not the debt, for which the defendant was taken in execution in *September*, were proveable under the commission of bankrupt; if it were, he was wrongfully taken in execution, and the money paid by him for his enlargement must of course be returned. But this debt was not proveable under the commission; for it was then uncertain whether or not any debt would become due. This is not a *security* within the statute 7 *Geo. I. c. 31. s. 1.*; which (after reciting that merchants &c. sell goods upon credit and take bills bonds notes or other securities for their money payable at a distant day) enables persons who have given or shall give credit on such securities to any person who may become bankrupt upon a good or valuable consideration for money or other thing not due or payable before such other person becomes a bankrupt to prove such bills &c, as if they were made payable presently; for, in the first place, there was no credit or debt as between the sheriff and the defendant; and, in the next place, this warrant of attorney is not one of the securities within the statute. The Legislature speaks only of such securities as created a debt absolutely and at all events, though payable at a future day: whereas in this case, the debt rested in contingency; it was uncertain when the warrant of attorney was given whether the sheriff would ever be called upon to pay the money, and consequently uncertain whether or not this debt would ever exist. It was a mere authority, enabling the sheriff to do a certain act in future in order to create a debt upon the happening of a certain event. This is like the case of *Goddard v. Vanderheyden* (a), where the plaintiff having become bail for the defendant paid the debt after the defendant's bank-

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STAINES
against
PLANCK.

(a) 3 *Wils.* 262.

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ruptcy, and it was holden that the defendant's certificate was no bar to the action; the Court saying that at the time of the bankruptcy the plaintiff had sustained no damage; that it was then wholly uncertain whether he would suffer any damage; and that there was no certain debt to which he could have sworn under the commission. The same doctrine was also established by the case of *Paul v. Jones* (a).

Marryat in support of the rule. The debt in question might have been proved under the defendant's commission, by considering the warrant of attorney as an acknowledgment of a debt then existing; for the warrant authorized the plaintiff's attorney to confess a judgment against the defendant in an action of debt *for money borrowed*. But if the Court should think that it cannot be considered in that light, the warrant of attorney created a debt proveable under the commission by virtue of the statute 7 Geo. 1.; the words of which are sufficiently comprehensive to include this case. The first section enacts that "every person who hath given or shall give credit on *such* securities as aforesaid (which by a reference to the preamble are explained to be bonds notes or other securities) to any person who is or shall become bankrupt upon a good and valuable consideration for any sum of money or other matter or thing whatsoever which is or shall not be due or payable before the time of such person's becoming bankrupt shall be admitted to prove his bills bonds notes or other securities promises or agreements for the same, in like manner as if they were made payable presently and not at a future day." Now this warrant of attorney was to indemnify the sheriff at all events; in the language of the act, the sheriff gave the defendant credit on a security upon a good consideration, and though not for money, yet for some other matter or thing. But even if this be not one of the securities mentioned in the statute, it is a promise or agreement to pay at a future day. This case therefore comes within the words as well as the meaning of the act of parliament. This warrant of attorney authorized the sheriff to enter up a judgment when default should be made in paying the original sum of 67*l.* 10*s.*; as default was made on the 22^d of June 1797 the sheriff should have signed judgment and carried in the roll immediately, which by relation would have referred back to the first day of the term, prior to the act of bankruptcy; and he ought not by his neglect, in not carrying in the

(a) *Ante*, 1 vol. 599.

roll, to prejudice the defendant. In the case *Ex parte Groome* (a), Lord *Hardwicke* said "If judgment had been given at law by the husband for this sum, *it is a debt notwithstanding the defeazance*;" which must mean judgment upon a warrant of attorney with a defeazance, because there never is a defeazance on the judgment itself. In the two cases alluded to, *Goddard v. Vanderbeyden*, and *Paul v. Jones*, there was no debt existing at the time of the bankruptcy.

Lord KENYON Ch. J. Although this case is new in specie, the principle on which it must be decided has been settled in a variety of cases. It is perfectly clear that a mere contingent debt cannot be proved under a commission of bankrupt: but if there be a legal debt, though liable to be defeated afterwards on a contingency, it may be proved under the commission. For that reason it frequently happens that a trader, who wishes to secure a provision for his wife and family in case of his insolvency, on his marriage gives a bond to trustees payable immediately; and then in the event of his subsequent bankruptcy, the bond being forfeited at law may be proved under the commission, because there is a legal debt. This principle has been so long and so clearly settled that it cannot now be shaken; and on examination it will be found that all the cases are reconcilable with it. In this case therefore if there had been a legal demand before the defendant's bankruptcy, though liable to be afterwards defeated by a contingency, it might have been proved under the commission. If indeed the judgment had been entered up so that by relation (b) it would have referred back to a day prior to the act of bankruptcy, and then the debt might have been proved under the commission. But this was a mere contingent debt at the time of the defendant's bankruptcy; judgment was not to be entered up *unless* default should be made in payment of the two sums on a day subsequent to the bankruptcy; and therefore this debt could not be proved under the commission. The statute 7 *Geo. 1.* only applies to cases where a legal debt is created before the bankruptcy, though the day of payment is postponed until afterwards.

Per Curiam

Rule discharged.

(a) 1 *Atk.* 117.

(b) In the course of the argument, the Court offered to the defendant's counsel to enlarge the rule, to give him an opportunity of amending his case, (if he could) by mak-

ing it appear that the judgment when signed related to the first day of *Trinity* term 1797: but it was answered that the defendant could not record the plaintiff's judgment, and that he could not now vary the case.

1799.

STAINES
against
PLANCK.

1799.

Thursday,
Nov. 21st.CUTHBERT and Another *against* HALEY.

If *A.* for an
usurious con-
sideration
give his pro-
misory note
to *B.*, who
transfers it
to *C.* for a
valuable con-
sideration
without no-
tice of the
usury, and
afterwards
A. gives a
bond to *C.*
for the a-
mount, the
bond is good.

TO debt on a bond in 2680*l.*, conditioned to pay 1340*l.* with interest, the defendant pleaded that the bond was given for securing money lent by one *Plank* to the defendant upon an usurious contract between *Plank* and the defendant, whereby there was reserved for forbearance of the money above 5*l.* for every 100*l.* &c. The plaintiff replied that the defendant made and delivered the bond for a just and lawful debt, and not for securing the payment of any money lent by *Plank* to the defendant upon usury or upon any usurious contract, as in that plea alleged; on which issue was taken.

At the trial at the *Westminster* Sittings before Lord *Kenyon* the case appeared to be this; *Plank* discounted eighteen promissory notes of the defendant's, amounting to 1344*l.* 2*s.* 3*d.*, and took usurious interest upon them. *Plank* afterwards carried them to the plaintiffs, his bankers, who gave him credit for them; when they became due the plaintiffs applied to the defendant, the maker, for payment, who, not being able to pay them, gave the plaintiffs the bond in question, for 1340*l.*, and paid them the remainder, 4*l.* 2*s.* 3*d.* in money. It was admitted that these notes came into the hands of the plaintiffs as bankers without fraud and without knowledge of the usury between *Plank* and the defendant. Lord *Kenyon* was clearly of opinion that the plaintiffs were entitled to recover, and a verdict was taken for them: but at the pressing solicitation of the defendant's counsel the point was reserved.

A rule was accordingly obtained in this term, calling on the plaintiffs to shew cause why the verdict should not be set aside and a nonsuit entered.

Erskine, *Gibbs*, and *Reader*, who were now to have shewn cause against the rule, after mentioning the case of *Ellis v. Warnes*, *Moor* 752, as a decisive authority in their favour, were stopped by the Court.

Mingay, *Marryat*, and *Lawes*, in support of the rule. It is clear that no action could have been maintained on the notes, because they were given on an usurious consideration. They were void even in the hands of an innocent holder for a valuable consideration. *Lowe v. Waller*, *Dougl.* 736. Then on principle it ought to be decided that the bond, which was given in lieu of

the notes, cannot be enforced in a court of law; otherwise this would be the obvious mode of evading the statutes against usury. This was so said in the case of *Tate v. Wellings* (a), where Lord Kenyon said, "But as the former bond was the consideration of this, on which the present action was founded, if that were void as being given for an usurious consideration, most undoubtedly this second bond would be also void." And the case of *Lowe v. Waller* shews that the circumstance of the bond being in the hands of a third person is immaterial. Besides this precise point was taken for granted both by the Bench and the Bar in the case of *Walton v. Shelley* (b). It is material also to consider the terms of the issue in this case, in which respect this case differs from that of *Ellis v. Warnes*, as reported in *Cro. Jac.* 33: here the issue is on the traverse in the replication, "that the bond was not given to secure the payment of money lent by *Plank* to the defendant upon usury nor upon any usurious contract." From the facts, which are admitted in this case, it is clear that the bond was given to secure the payment of the money lent by *Plank* upon an usurious contract. The case of *Ellis v. Warnes* is also distinguishable from the present in another respect; there the question arose upon the statute 13 *Eliz. c. 8. s. 3.*, which enacts that all bonds &c for payment of any money &c. upon usury &c, "upon or by which loan or doing there shall be reserved or taken above 10 *l.* for the hundred for one year, shall be utterly void." There more than legal interest was not reserved by the loan from *Ellis* to *Warnes*, though more had been reserved by the original loan from *Warnes* to *Aldworth*: whereas in this case more than legal interest was reserved by the contract between the plaintiff and the defendant; for the bond in question was given for 1340*l.* which included the usurious interest as well as the principal. In *Roberts v. Trenayne* (c) it was holden that where the consideration is usurious the securities are all void, though one be taken for the principal alone and another for the interest: à fortiori therefore must this instrument be void, which includes the usurious interest as well as the principal.

Lord KENYON Ch. J. The construction that has already been put on the statutes has been in a variety of instances abundantly hard. The courts have said, and rightly so, that the innocent holders of securities given on usurious considerations must suffer for the wickedness (or rather unlawfulness, for it has been said that

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against
HALEY.

(a) *Ante*, 3 vol. 537.

(b) *Ante*, 1 vol. 296.

(c) *Cro. Jac.* 508.

1799.
CUTHBERT
against
HALEY.

usury is only *malum prohibitum*, and not *malum in se*,) of the original parties to the transaction. But this is an attempt to carry that doctrine much farther than any prior case, and farther than policy or the words of the act of parliament require: and if it were to succeed, it might affect most of the securities in the kingdom; for if, in tracing a mortgage for a century past, it could be discovered that usury had been committed in any part of the transaction though between other parties, the consequence would be that the whole would be void. It would be a most alarming proposition to the holders of all securities. I admit that the securities themselves that are tainted with usury cannot be enforced in a court of justice, even though they be in the hands of innocent purchasers for a valuable consideration without notice. Such was the case of *Lowe v. Waller*, where Lord Mansfield was at first surprised to hear that a similar construction had been put upon the gaming act (a): but when he came to consider the case of *Bowyer v. Bampton* (b), he was satisfied that this construction ought to be put upon the statute against usury. And therefore the plaintiffs in this case could not have maintained any action on the notes given by the defendant to *Plank*. But here the notes were destroyed after they got into the hands of the plaintiffs, and the bond in question was given to them, they not knowing of the usury between *Plank* and the defendant. I admit that, if one security be substituted for another by the parties in order to get rid of the statute against usury, the substituted as well as the original security will be void: but it is not pretended that that was the case here. In the case of *Walton v. Shelley*, that has been alluded to, this point was never under the consideration of the Court; and therefore that case is no authority in the present.

GROSE J. If the bond in question had been given to *Plank*, it would have been void, because *Plank* was a party to the usury: but the case is different as between the plaintiffs and the defendant, because it is admitted that the former were ignorant of the usurious transaction between *Plank* and the defendant. I do not think that this bond was given for an usurious consideration, or in the language of the issue "for securing the payment of any money lent by *Plank* to the defendant upon usury or upon any usurious contract;" but as between these parties I consider the bond to have been given by the defendant to secure to the plaintiffs the payment

(a) 9 An. c. 14. s. 1.

(b) 2 Str. 1155.

of the amount of the bills, for a just and lawful debt. It is true that the consideration of the bond was the giving up of the bills: but the bond was not given for the money lent by *Plank* to the defendant.

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CUTHBERT
against
HALEY.

LAWRENCE J. Although Lord *Mansfield* doubted when the case of *Lowe v. Waller* was argued whether or not securities that were void in the hands of the original parties on account of usury were also void in the hands of third persons who were not privy to the usury, he found himself bound to determine that they were by the case of *Bowyer v. Bampton*, that arose on another act of parliament in which nearly the same language was used as in the statute against usury. Then it may be material in this case to consider the statute of 13 *Elizabeth*, and the construction that has been put upon that. By that act "all bonds contracts &c for payment of money &c upon usury, upon or by which loan or doing there shall be reserved or taken above 10 *l.* for every 100 *l.* for one year, shall be utterly void." How did the Court construe that act, the words of which are nearly similar to those used in the statute of *Anne* (a), on which this question arises? In *Ellis v. Warnes* it was holden that the plaintiff, not knowing of the usury between the defendant and *Aldworth*, and having paid a bona fide consideration to *Aldworth* for the transfer of the debt due from the defendant, should not suffer by the usury in the original transaction. That construction having been put on the statute of *Elizabeth*, it ought to govern us in the construction on the statute of *Anne*. And I know of no decision in which it has been holden that the substituted security shall in all cases be void on account of the usury that may have vitiated the original security. It is not necessary in this case to consider what would have been the effect of the evidence offered in *Walton v. Shelley* respecting the usury; we do not know but that the indorsee there was privy to the usury; but it would be too much to conclude from what passed in that case that the court would have decided that the bond was void, though it should have appeared that the obligee in the bond was ignorant of the usury in the prior transaction respecting the notes. Then it is said that the plaintiffs are concluded by the terms of this issue: but I think that my Brother *Grose* has given a sufficient answer to that argument. The cause of giving this bond was to exonerate the defendant from the claim that the plaintiffs had on him by reason of the notes; et in jure non remota causa sed proxima spectatur.

(a) 12 *An* c. 16. s. 1.

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CUTHBERT
against
HALEY.

LE BLANC J. I am of opinion that there is no ground for making this rule absolute to enter a nonsuit. The authorities only warrant us in deciding that the substituted security, which has been given for a security contaminated (if I may use the expression) by usury, is void if such substituted security be given either to the party to the original contract, or to his representative, his executor. But I am not aware of any case in which it has been holden that where the original security given to one person has been cancelled and another security given to another person, ignorant of the usury, that rendered the former security void, such second security is void in the hands of such an innocent person. The case in *Moor* shews that such a security is a valid one. And it appears from the case, cited from *Gro. Jac.* 508., that it is immaterial whether one security only be given for the whole the principal and interest, or different securities the one for the principal and the other for the interest. With regard to the case of *Walton v. Shelley*; as the witness produced was rejected, no evidence was given of the usurious transaction, and consequently it did not appear whether or not the obligee of the bond had any knowledge of the usury. In the argument indeed, in order to raise the question respecting the competency of the witness, it was supposed that the bond was void in the hands of an innocent holder on account of the usury in the prior transaction: but as the Court decided that the witness was incompetent, it was not necessary to go into the other point respecting the usury. Referring therefore to the terms of this issue, I think it is fair to say that under the circumstances of the case the issue is not supported by the evidence, because the bond was given, not to secure the payment of money lent by *Plank* to the defendant upon usury or upon any usurious contract, but to secure the payment of money advanced bonâ fide and on good consideration by the plaintiffs to the person who brought the bills to them. This was the consideration of the bond. On this point therefore, as well as on the general principle, I am of opinion that the plaintiffs were entitled to recover.

Rule discharged.

1799.

Friday,
Nov. 22d.NELSON *against* SHERIDAN.

IN June 1797 the plaintiff recovered a judgment, damages 136*l.*, against the defendant in an action on a bill of exchange, on which judgment he brought an action of debt and obtained judgment by default in this term. And now

Marryat, on the part of the plaintiff, moved that it might be referred to the Master to compute interest on the judgment, and to ascertain the damages sustained by the plaintiff by reason of the detention of the debt for which this action was brought. He produced an affidavit, in which it was stated that there was due to the plaintiff the sum of 18*l.* for interest from the time of signing the first judgment to the time of obtaining the judgment in this action. And he contended that this case came within the principle of those already decided, where it had been referred to the Master to see what was due to the plaintiff on his obtaining an interlocutory judgment. *Holdipp v. Otway*, 2 *Saund.* 106; *Hewitt v. Mantell*, 2 *Wils.* 374; *Theluffson v. Fletcher*, *Dougl.* 316; *Rasbleigh v. Salmon*, 1 *H. Bl.* 252; *Andrews v. Blake*, *ib.* 592; *Longman v. Fenn*, *ib.* 541; *Shepherd v. Carter*, *ante*, 4 vol. 275; and *Berthen v. Street*, *ante*, 326. But

The Court refused to grant the rule.

LORD KENYON Ch. J. said, It should be left to a jury to consider whether any and what damages should be given. Perhaps they may think that in this case no damages at all ought to be given.

LAWRENCE J. In some of the cases cited, interest was to be given by the very terms of the contract between the parties.

Rule refused.

NICHOLS one &c *against* EARLE one &c.Friday,
Nov. 22d.

A RULE having been obtained, calling on the plaintiff to shew cause why the bail-bond should not be delivered up to be cancelled and all the proceedings stayed with costs, on the ground that as the defendant was an attorney of this court as well as the plaintiff the privilege of the former exempted him from being arrested.

Lawes, for the plaintiff, now admitted that the proceedings were irregular; but contended, on the authority of *Barber v.*

Where both parties are attorneys of the same court, the plaintiff cannot hold the defendant to bail: if he do, the Court will discharge the defendant out of custody,

and order all the proceedings to be stayed *without costs*.

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against
EARLE.

Palmer (a), that the proceedings ought to be stayed *without costs*.

Pell, in support of the rule, said that in a subsequent case, *Lodge v. Taylor (b)*, *Trin.* 1797, this Court had made a similar rule absolute with costs. But

The Court, being of opinion that this mode of application ought to be considered as a substitute for a plea in abatement where costs are not given, made the

Rule absolute without costs.

(a) *Ante*, 6 vol. 524.

(b) In that case the question in dispute was whether or not the defendant were a practising attorney; it turned out on inquiry that he was, and the point respecting the costs passed without any observation.

Friday,
Nov. 22d.

BENSON *against* CHESTER.

A claim of a right of common without stint as annexed to an ancient messuage, without land, cannot, as such, exist by law. An ancient deed of feoffment granting the wastes of a manor to feoffees, in trust to permit the tenants and inhabitants &c to use and enjoy the same as they had formerly done or been accustomed to do, must be taken to mean such a right of common as may by law exist, namely, a right of common restricted by levancy and couchancy.

THIS was an action upon the case for injuring the plaintiff's right of common. The plaintiff declared in respect of his possession of a certain messuage and divers parcels of ground at *Tborne* lying within the manor of *Hatfield* in the county of *York* for a right of common of pasture in and throughout all the commonable waste grounds in the manor for all his commonable cattle levant and couchant upon his said messuage and land &c; and that the defendant wrongfully *surcharged* the said common &c. The second count was for unlawfully *depastring* the said common &c. And there were other counts stating the fact in different ways. The general issue was pleaded.

At the trial before *Lawrence J.* at the last assizes at *York* the plaintiff proved his right of common in the usual way for his cattle levant and couchant upon his messuage and land, by proof of the exercise of such right by himself and those whose estate he had. He also proved that the defendant had turned out a great number of cattle on the common. Evidence was also given of a decree in the Court of Exchequer in 1631, made in a cause between *Sir Cornelius Vermuden*, farmer of his Majesty's manor of *Hatfield*, plaintiff, and *Portington* and others defendants, reciting as is hereafter recited in the following deed, and decreeing that a conveyance should be made to the tenants &c of the manor, as is in that deed mentioned, of certain lands wastes &c. (being the waste or common in question) in lieu of their right of common over the rest of the manor wastes as mentioned in the following deed. The

deed of feoffment was then proved, dated 15th July 1633, inrolled in Chancery between the said Sir *Cornelius Vermuden* Kt. and *J. Gibbon* Esq. of the one part, and *Henry Lee* and fifteen other persons of the manor of *Hatfield* of the other part; (reciting that King *Car. I.* was seised in his demesne as of fee, in right of the Crown, of the manor of *Hatfield* in the county of *York*, and of *Hatfield Chace*, and of divers wastes thereto belonging, great part whereof was subject to be overflowed; and that he had before appointed certain commissioners to treat with the tenants and inhabitants of all the townships precincts &c. in and adjoining to the wastes claiming right of common there, touching what part of the commons to be improved they would accept in full satisfaction of their right and title to the residue of the same; and reciting further that disputes had arisen between the said Sir *Cornelius Vermuden* (who had undertaken to drain the wastes of the manor in consideration of a grant of one-third of the lands from the Crown in severalty) and the tenants and inhabitants of the said manor &c, which were referred to the arbitration of certain commissioners appointed by the Crown; and that it was by them awarded that the tenants of the manor of *Hatfield* and the members thereof should have unto them and their heirs, or such persons and their heirs as they should appoint, their former allotments for their common confirmed unto them, according as they were set out by former commissioners therein named on the 14th of *March* 1627 with certain additions therein stated; and reciting further that King *Charles I.* had by his letters patent of the 5th *Feb.* 4. *Car. 1.* granted to the said Sir *Cornelius Vermuden* Kt. all the said manor of *Hatfield* &c. and all the lands rents &c. thereof, with all the wastes and commons thereunto belonging; and that the said *J. Gibbon* was lately become interested in some part thereof under Sir *C. Vermuden*;) by which deed of feoffment the said Sir *C. Vermuden* and *J. Gibbon* granted enfeoffed and confirmed to the said *H. Lee* and the fifteen other persons named certain lands within the manor particularly described (being the same that had been decreed to be conveyed in lieu of their right of common) *and all and singular the commons and turf moors*, rights, profits, privileges, &c to the same premises or any part thereof belonging, or to any the several messuages lands tenements or hereditaments of any of the said tenants belonging or in anywise appertaining, and all the right title and interest of the grantors therein; habendum to them and their heirs, *upon trust*, for the sole benefit of themselves and their heirs, *and of all and singular*

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BENSON
against
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against
CHESTER.

singular other the tenants and inhabitants of Hatfield, Thorn, Duncroft, Stainford, Fishlake, and Silkhouses, and of all and other the tenants and inhabitants of the said manor of Hatfield, severally and respectively to use and enjoy the same and every part thereof as they formerly had done or been accustomed to do.

This action was brought in respect of the wastes or commons conveyed by the above-mentioned deed.

The defendant claimed a right of common without stint over the same wastes, in respect of what was called *an ancient common-right house*, without any land annexed to it; and after endeavouring by cross-examination of the plaintiff's witnesses to establish the same, by proving instances of user to that effect, his counsel offered to shew by evidence that the right of common had been exercised by the occupiers of such ancient common-right houses to any extent that the parties could afford to stock, without any regard to levancy and couchancy; and that the plaintiff himself was only entitled to his right of common in respect of his occupancy of one of such ancient houses, and not in respect of his land annexed. But *Lawrence J.* was of opinion that the claim of a right of common without stint as annexed to a house, without land whereon the cattle could be levant and couchant, even supposing it were proved in fact to have been exercised by the occupiers of such houses, could not be supported in law; according to the doctrine laid down in the case of *Scholes v. Hargreaves* (a). And he said that if the right of turning on cattle without stint did belong to the houses, it must be by considering the tenants as having an interest in the wastes in the nature of a tenancy in common: but he thought that could not be so considered in this case, because the land was vested in the feoffees in trust to permit the tenants of the manor to enjoy it in the same manner as when the soil was in the Crown; at which time it was clear that there only existed a right of common. Under these directions the jury found a verdict for the plaintiff.

A rule having been obtained, calling on the plaintiff to shew cause why there should not be a new trial on the ground of misdirection,

Law, Topping, and Lambe, were to have shewn cause against it: but the Court desired to hear the other side.

(a) *Ante*, 5 vol. 46.

Wood and *Holroyd* in support of the rule. It is notorious that many such rights as this claimed by the defendant are acknowledged in many parts of the kingdom; and property to a very great extent is implicated in the present question. In several instances of private inclosure acts, issues have been directed to try whether the rights of common belonged to the owners of ancient messuages, or to the owners of messuages and lands; which direction would have been nugatory if no such right could exist by law in the former. In the cases of *Wallingfer* inclosure in *Yorkshire*, and of *Pickering Forest* in the same county, the issues were found in favour of the owners of the messuages; no objection was taken in point of law to such verdicts, but the parties interested acquiesced, and those rights have been ever since acted upon. The same right prevailed on *King's Sedgemoor* in *Somersetshire*; which was mentioned by Mr. Justice *Gould* upon the trial of the *Wallingfer* issue: and upon the late inclosure of that moor allotments were accordingly made to the owners of those old tenements, called *Auster* tenements. So in a replevin tried before Mr. Justice *Wilson* in 1789, wherein the right of these ancient messuages over the waste in question came in controversy, he decided in favour of their right. Admitting then that this right has been exercised in fact as far back as living testimony can go, which is evidence of its existence not only since but before the deed of feoffment, it must now be taken to be the same ancient right that is recognized and confirmed by that deed. And after so long an usage the Court will make every presumption in support of the right, if there be any way in which it can exist by law. It appears that originally the manor of *Hatfield* and all the wastes to the extent of 60,000 acres belonged to the Crown; and that in 1630 the Crown entered into a contract with Sir *Cornelius Vermuden* to grant him one-third upon condition of his draining the whole. This agreement could not be executed without the consent of the tenants who had rights of common on the wastes; whereupon a commission issued, under which the tenants contracted and agreed to relinquish their rights over the one-third in consideration of having several parts of the wastes allotted to them in severalty, discharged from all claim or title on the part of the lord. A few years afterwards, (the whole manor having been in the meantime conveyed by the Crown to Sir *C. Vermuden*) the deed of feoffment was made for carrying that agreement into execution; whereby the wastes in question were conveyed to trustees in fee, in whom the use was executed, for

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the benefit of all the tenants and inhabitants of the manor, to use and enjoy the same in the same manner they had been accustomed to do. Now the right claimed by the defendant may be supported in one or other of two ways: either first, by supposing that prior to the deed of feoffment the owners of the ancient messuages were tenants in common of the sole pasturage of the wastes (a); which is shewn by the mode of enjoyment exercised ever since; and which may be taken to be the same as is referred to in the deed of feoffment. Or, Secondly, by presuming that at the time of that grant a release was executed by the tenants of their ancient right of common over the whole or those parts of the wastes which were granted in severalty to Sir C. Vermuden; and that they took a new estate in the remaining wastes under that deed. In that case the ancient right of common, which, according to *Tyrringham's* case (b), must have been common appurtenant and not appendant, supposing it to have existed in the manner now contended for by the plaintiff, was extinguished; for by a release of part of the right of common the whole is gone. *Rotherham v. Green*, Cro. Eliz. 593; *Morse v. Well*, 1 Brownl. 180; *Tyrringham's* case, 4 Co. 38. a; *Wild's* case, 8 Co. 79. a. Then the deed of feoffment could not operate as a re-grant of the old right of common, because the use was executed in the feoffees and their heirs; and therefore the tenants can only take an equitable interest, and not their ancient legal right of common. This therefore will exclude the question of levancy and couchancy, and consequently is not within the reason of the case of *Scholes v. Hargreaves* (c), where the right was claimed quâ right of common. The question will turn upon the fact, in what manner the waste was enjoyed by the tenants before the deed of feoffment; and the evidence will shew that the owners of the ancient messuages alone enjoyed the right of turning their cattle on the wastes without stint.

Lord KENYON C. J. There does not appear to be the least pretence for the owners of the houses claiming the soil in the wastes as tenants in common: at the trial they did not claim such a right, and the facts of the case negative it. Nor has the defendant's claim to a right of common for an unlimited number of cattle, as annexed to his messuage only, any better foundation.

(a) Vid. *Revell v. Jodrell*, Ante, 2 vol.
424.

(b) 4 Co. 37. a.

(c) Ante, 5 vol. 46.

To one argument urged on behalf of the defendant I cannot give my assent. It is said, that a release of a right of common over part of the common is an extinguishment of the whole right of common; and cases have been cited to that effect: but I should wish to examine those cases thoroughly before I subscribed to such a position, especially where all the commoners join in the release. A release by one commoner of his right over part of the common may possibly operate as a release of his right over the whole: but if that were the consequence of a release by all the commoners, there would long ago have been an end of almost all the rights of common throughout the kingdom. But the determination of that question one way or the other will not affect this case. Nothing can be clearer than that the parties claiming under this feoffment can only claim a right of common. In the common case where the lord of a manor conveys away part of the wastes to a third person, though the right of ownership of the soil changes hands, the right of common still subsists in the commoners as well over that part of the wastes that the lord has conveyed away as over that part that he retains in his own hands. But this deed of feoffment is cautiously drawn to avoid all disputes. Then it is said that this is an use executed in the feoffees: but that use is as to the right of the soil: but the right of common is an easement over the soil; they are collateral rights, and may exist in different persons. The right of the commoners under that deed is to be exercised as it had been formerly; and that right was a right of common to be measured by levancy and couchancy. It is contended however on the part of the defendant that the owner of a messuage only within this district, or the owner of a messuage with only a square yard of land annexed to it, may collect as many cattle as he can from all parts of the kingdom and stock them on this common: but such a right of common cannot in law exist. I am therefore of opinion that the directions of the learned Judge were rightly given.

GROSE J. The right now claimed by the defendant to the soil as a tenant in common was not set up at the trial; and it is inconsistent with the feoffment. By that deed the tenants of the manor were to use and enjoy the commons and turf moors "as formerly they had done or been accustomed to do." Then how had the commoners been accustomed to enjoy this right? By law they could only enjoy it as commoners, for cattle levant and couchant. Therefore there is no pretence to say that the

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owner of a house, without land, has a right to turn on any number of cattle, without regard to levancy and couchancy.

LAWRENCE J., having tried the cause, declined giving any opinion now.

LE BLANC J. This is an action on the case brought by the plaintiff for a surcharge of common by the defendant; and the plaintiff declares on his possession of the right of common, by virtue of a messuage and land of which he is possessed, alleging that the defendant interrupted him in that right. The objections made by the defendant are, 1st, As to the manner in which the plaintiff claims his right; and 2dly, With respect to the right of common claimed by himself. But the plaintiff declared on his possession; and at the trial he clearly proved his enjoyment of the right of common which he claimed in his declaration: it also appeared that the defendant had turned out on this common a number of cattle which were not levant and couchant on any land that he possessed within the parish, but which he had brought from other parishes. In this situation the plaintiff was entitled to a verdict, unless the defendant could support his claim to a right of common for any number of cattle without stint, by reason of his possession of an ancient messuage. This manor was formerly in the Crown; and in consequence of an adventurer stepping forward, who engaged to drain this large tract of land, he was to receive a certain proportion of the land in severalty, over which the commoners were to have no right of common, and the rest of the land was to be drained for the use of the commoners. In order to carry this into effect the deed of feoffment was executed, by which certain parts of the commons were conveyed to feoffees by way of use executed in them, but in trust to permit the tenants &c. to use and enjoy the common in the same manner as they had formerly done. The argument now urged on behalf of the defendant is, that by this feoffment the enjoyment of the common by the commoners was to be in the same manner as before, that since that time they have in fact enjoyed it by turning on any number of cattle they pleased without regard to levancy and couchancy, and that this was strong evidence to shew that before that time they had been accustomed so to enjoy the right of common. Now admitting that evidence of subsequent usage would be evidence of prior usage, yet the language of this deed must be understood as confining the enjoyment of the common to the manner in which the commoners had

before been *legally* accustomed to enjoy it, and not to the manner in which many persons had enjoyed it by usurpation, as is frequently the case. Now it is clear from the decree in 1631, and the feoffment which was made in consequence of it, that before that time these persons held and enjoyed these wastes *as commoners*; and if so, they could only enjoy that right subject to those restraints and limitations that the law imposes on commoners. Whether the right conveyed by that deed were a legal or only an equitable right is immaterial in this action, because the plaintiff has declared on his possession: it is equally immaterial whether the defendant's right be a legal or an equitable right, because he has surcharged the common by putting on more cattle than he had a right to do. The feoffment only conveyed a right to the commoners to use the common as they had enjoyed it before; that right may be measured by levancy and couchancy; and as the defendant did not use the common in right of any messuage and land in the parish on which the cattle could be levant and couchant, he surcharged the common; and therefore I perfectly concur in the opinion given by the learned Judge at the trial.

Rule discharged.

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ARGENT *against* DURRANT.

Saturday,
Nov. 23d.

IN trespass for breaking and entering the plaintiff's close and pulling down his wall, the defendant pleaded the general issue, and a license from the plaintiff. At the trial before *Buller J.* at the last assizes at *Croydon*, the plaintiff proved the trespass and pulling down the wall. The defendant, having failed in proving the license, offered evidence to shew that the soil and freehold were his; that he had let the premises to the plaintiff, whose term therein was expired after due notice to quit; but that, the plaintiff insisting on his right to continue there, the defendant entered &c. It was objected that the defendant could not give evidence of title under the general issue. But *Buller J.* received the evidence, reserving the question for the consideration of this Court. And the facts being proved as stated, a verdict was entered by consent for the plaintiff, subject however to be set aside and a verdict entered for the defendant if this Court should be of opinion that the evidence was properly admitted.

The defendant in trespass *quare clausum fregit* may give evidence of soil and freehold under the general issue.

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Adam and *Best* accordingly obtained a rule nisi for setting aside the verdict for the plaintiff; and cited the case of *Dodd v. Kyffin* (a), where the Court held that the defendant in trespass might give evidence of title under the general issue.

Shepherd Serjt. and *Marryat* now shewed cause against that rule. Title cannot be given in evidence under the general issue for the purpose of justifying a trespass committed, but only where it is evidence of possession. For example; there may be property of which no person is in the actual and constant occupation, as a waste; and there, upon a question whether such a waste be or be not parcel of a certain manor, title may be given in evidence to shew that the plaintiff was not in the implied possession of the land. And upon that ground the case of *Dodd v. Kyffin* proceeded; where, the possession being doubtful, the Court said that the defendant might under the general issue give evidence *of title and of right to possession*. But it is presumed that the doctrine there laid down must be confined to such a case as that; for the Court did not mean there to decide generally, that title may in all cases be given in evidence under the general issue. The general rule however is that every matter of justification must be pleaded; otherwise the plaintiff would be taken by surprize. If indeed the necessary consequence of the defendant's being entitled to the freehold were that he could not commit a trespass, there would be some reason for receiving the evidence in this case: but title to the freehold may or may not be matter of justification in trespass, for the freehold may be in one man and the right of possession in another; as where tenant for years brings trespass against the owner of the freehold or a stranger. If title might be given in evidence in all cases on the general issue, the plaintiff must always be prepared to prove his title as well as his possession; and thus the object of special pleading, which is to reduce the matters in dispute to a single issue in order to avoid expence, would be defeated. Whereas if the title only were meant to be disputed, the parties on the traverse to the plea of liberum tenementum would go to trial prepared with proof only on that point. Or if the question turned on the right to possession, the plaintiff to the plea of liberum tenementum might reply such matter as would put that point only in issue. They also cited *Bro. Abr. Gen. Issue*, pl. 81. where it is said that if a man entitled under a stranger justify by his command, this

(a) *Ante*, 7 vol. 354; et vid. *Taunton v. Cossar*, *ib.* 432.

ought to be pleaded and not given in evidence under the general issue; so it is of rent service, rent charge, and license, which must be pleaded. Now the principle there laid down applies equally to cases where the defendant entitles himself in his own right, as to those where he is entitled under a stranger. So in *Dove v. Smith* (a), in trespass quare clausum fregit Lord Holt said "the defendant could not give any matter of right in evidence under the general issue, not even in mitigation of damages."

Lord KENYON Ch. J. It is now too late to discuss this question, which appears to have been settled in Lord Coke's time. In a case in 1 Leon. 301. In trespass "the defendant pleaded not guilty, and if he might give in evidence that at the time of the trespass the freehold was in such an one and he as his servant and by his command entered was the question; and it was said by Coke that the same might so be well enough; and so it was adjudged in *Trevilian's* case; for if he by whose command he entereth hath right, at the same instant that the defendant entered the right is in the other, by reason whereof he is not guilty as to the plaintiff; and judgment was given accordingly." Conformably to this doctrine I have always understood that it has been the practice to permit the defendant to give liberum tenementum in evidence under the general issue. And so we decided in a late case, *Dodd v. Kyffin*; where our opinions did not proceed on the distinction now taken at the bar, but on the broad ground that title might be given in evidence under the plea of not guilty. The plaintiff cannot be prejudiced by this rule; because, when the defendant gives evidence of title under the general issue, the plaintiff may reply by evidence.

GROSE J. When the case of *Dodd v. Kyffin* was argued, I certainly meant to say that in all cases title might be given in evidence under the general issue; and I have always considered that to be the practice.

LAWRENCE J. There are several other authorities, in addition to those alluded to, in support of the opinion that the defendant may give liberum tenementum in evidence under the general issue. In *Gilb. Evid.* 258. it is said "In trespass on not guilty the defendant may give in evidence that the right of freehold was in J. S., and that he by his command entered; for if the defendant entered by the command of J. S., it is the same as if J. S. entered, and

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(a) 6 Mod. 153.

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consequently if *J. S.* hath the right the estate is vested in him by the entry, and consequently the defendant is no trespasser on the plaintiff; and by such evidence as this he falsifies the declaration of the plaintiff, for he proves that he did not break his close as the declaration sets forth; it is therefore proper for the general issue." There is also a case in *Andrews (a)*, *Bartholomew v. Ireland*, to the same effect. There in trespass for breaking and entering the plaintiff's chambers the defendant pleaded that the chambers were the freehold of *J. K.*, and that the defendant as his servant entered; on demurrer it was objected that the plea could not be supported, because, though *J. K.* had the freehold, the plaintiff might notwithstanding have a right to the possession as a tenant at will or for years: but "the whole Court were clearly of opinion that it was in substance a good plea;" and they added "it is a constant rule that in trespass upon not guilty pleaded, a freehold may be given in evidence." And though this point was not immediately before the Court, yet they alluded to the known practice, as to what was evidence on the plea of *liberum tenementum*, to shew that the plea in question was good. With regard to the case cited from *Bro. Abr.*; there is a case in *Cro. Eliz.* 76. that shews that such a plea would amount to the general issue; there in trespass for breaking the plaintiff's close the defendant pleaded that *J. S.* was seised of the land and let it to *J. D.* and that he as his servant entered, and gave no colour to the plaintiff, for which the plaintiff demurred; and *Wray Ch. J.* said, "He ought to give colour, though he justifieth as a servant." And the necessity of giving colour in any plea where a title is set out as matter of defence shews that such title might be given in evidence on the general issue, if that had been pleaded. 10 *Co.* 90. *Dr. Leyfield's* case. The case of *Dodd v. Kyffin* was the common case of colour, if pleaded. As to the passage cited from 6 *Mod.* 153: it by no means appears that it was said by Lord *Holt*; the whole of that case is confused; and the conclusion rather appears to have been merely the opinion of the reporter. And with respect to the practice upon this point, I have always conceived that *liberum tenementum* may be given in evidence under the general issue. I remember one case indeed on the Western circuit, where the late Lord Chief Justice of the Common Pleas adopted the distinction now taken by the plaintiff's counsel. But in another case, *Harwood v. Harwood*, *Summer assises* 1788

(a) *Andr.* 108.

at *Salisbury* Mr. J. Buller permitted the defendant under the plea of the general issue to give evidence of title: I do not however recollect that any objection was taken to the evidence.

LE BLANC J. I have always considered this to be a settled point. And this comes within the authority of *Dodd v. Kyffin*.

Rule absolute.

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PYNE *against* ERLE.

Monday,
Nov. 25th.

THE plaintiff, having recovered a judgment against the defendant for 400*l.* on a bond, charged him in execution in the year 1783, and died in 1797. In this term the defendant moved to be discharged out of custody, his wife having taken out administration to the plaintiff.

Lawes now shewed cause against that rule. First; he said that the letters of administration were void, because the defendant's wife in taking out administration had sworn that the plaintiff's effects only amounted to 5*l.* whereas this alone was a debt of 400*l.* And, secondly, he contended that, as the plaintiff's attorney had a lien on the judgment for his costs, the defendant ought not to be discharged out of custody until he was satisfied for his costs. But

The Court thought there was no foundation for the opposition to the rule.

Lord KENYON Ch. J. said, If the administration had been granted by an inferior jurisdiction, and there were bona notabilia out of that diocese, the administration would have been void. But this administration, having been granted by the Prerogative Court, is good. If indeed the letters of administration have been obtained by fraud, they may be hereafter set aside on that ground: but at present it is a legal administration; and that being so, there is an end of this action, the defendant's wife being the legal representative of the plaintiff. On the other point, I do not think that the plaintiff's attorney has any lien on the judgment, so as to prevent the defendant being discharged.

Rule absolute.

The plaintiff, having charged the defendant in execution, died, the defendant's wife took out administration to the plaintiff; then the Court ordered the defendant to be discharged out of custody, saying that the plaintiff's attorney had no lien on the judgment for his costs.

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Monday,
Nov. 25th.SEAMOUR *against* BRIDGE.

The plaintiff is entitled to costs up to the time of the defendant's paying money into court; though the plaintiff afterwards give notice of trial, which he neglects to countermand, whereby the defendant is entitled to judgment as in case of a nonsuit.

IN assumpsit, the defendant paid money into court as to part of the demand, and pleaded non assumpsit to the rest. Issue was joined in *Easter* term last, and notice of trial was given for the last sittings in *Trinity* term, which was continued to the sittings after *Trinity* term: but the plaintiff neither entered his cause, nor countermanded his notice of trial, but took the money out of court; and now moved in this term to have his costs taxed up to the time of the defendant's paying money into court, and that the defendant should have his costs taxed subsequent to that, and that the balance should be paid over to the party to whom it should be found by the Master to be due.

Nolan, in support of the rule, cited *Hartley v. Bateson* (a); and relied on the distinction taken by *Buller J.* in *Kabell v. Hudson* (b), that, if the plaintiff accept the money paid into court at any time before trial, he is entitled to his costs up to the time of paying the money into court; otherwise, if he proceed to trial and fail. And (he said) it makes no difference in this case that the defendant was entitled to judgment as in case of a nonsuit on account of the plaintiff's not having proceeded to trial pursuant to his notice. *Savage v. Francklyn* (c), and *Bate v. Crane* (d).

Park opposed this in the first instance; and said that the rule was not so general as was contended for, that where the plaintiff did not actually proceed to trial he might have his costs taxed up to the time of the defendant's paying money into court; for it is otherwise if a juror be withdrawn (e). Now the present case falls within the reason of that; for here the defendant is entitled to judgment as in case of a nonsuit. But

By the Court. The practice seems fully settled by the cases cited on the part of the plaintiff; and it is now further certified to us by the master that that continues to be the practice.

Rule absolute.

(a) *Ante*, 1 vol. 629.

(b) *Ante*, 4 vol. 11.

(c) *Barnes*, 280. quarto edit.

(d) *Barnes*, 287.

(e) *Stothart v. Johnson*, *ante*, 3 vol. 657.

1799.

Tuesday,
Nov. 26th.The KING *against* T. FINMORE.

AN indictment having been preferred against the defendant at the Quarter Sessions for the county of *Berks* for a nuisance in stopping up a public highway leading through *Fulscote* farm, he removed the indictment here by certiorari, giving the usual recognizance (a) required by the stat. 5 *W. & M. c. 11. s. 3. (b)*. The defendant was found guilty at the last *Lent* Assizes for *Berkshire*, and afterwards died on the 6th of *April* last, before the day in bank. The costs of the prosecution were afterwards taxed; and they not having been paid by the administrator of the defendant, a rule was obtained calling on the defendant's bail to shew cause why their recognizance should not be estreated, on the usual affidavit stating that *J. Kirby* the prosecutor was the party grieved (c). This application was founded on the authority of *R. v. Davies (d)*.

If a defendant remove an indictment here by certiorari, giving the usual recognizance under stat. 5 *W. & M. c. 11.*, and be found guilty, and die before the day in bank, his bail are liable to pay the costs.

Wigley now shewed cause against that rule. The defendant having died after verdict and before the day in bank, no judgment could be entered up against him; this not being a case within the stat. 17 *Car. 2. c. 8.*, which is in terms confined to "*actions personal real or mixed.*" Then if no judgment could be entered up against him, he was not *convicted*, within the meaning of the stat. 5 *W. & M. c. 11.*; for a *conviction* in that act means a *judgment*; and no costs are due until conviction. The bail cannot be called upon to pay the costs until some part of the condition of their recognizance is forfeited: and in this instance every part of that condition was complied with; the defendant appeared, pleaded, gave regular notice of trial, and tried the indictment, which was all that the bail undertook should be done. In *R. v. Lyon (e)*, where it was holden that the bail were liable to the costs, the recog-

(a) The terms of the condition of the recognizance are, that the defendant shall appear in *B. R.* on &c, and plead to the indictment; and try the same at &c, and give due notice of trial to the prosecutor; and appear from day to day in the said court, and not depart the said court without leave.

(b) Which enacts that *if the defendant be convicted*, the Court of *B. R.* shall give reasonable costs to the prosecutor, if *he be the party grieved &c*, which shall be taxed &c; and that the said recognizance shall not be

discharged till the costs so taxed shall be paid.

(c) Vide *R. v. Sharpness, ante*, 2 vol. 47; *R. v. Kettleworth, ante*, 5 vol. 33; and *R. v. Williamson, ante*, 7 vol. 32.

(d) *E. 25 Geo. 3. B. R.* There the case was precisely similar to the present; and, after argument by

Erskine for the bail and *Mingay* contra,

The Court held that the bail were liable for the costs.

(e) 3 *Burr.* 1461.

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The KING
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nizance was forfeited for not proceeding to trial according to notice. But in *R. v. Earl (a)*, where there was a rule for the prosecutor of an information to pay costs for not going on to trial, as the defendant died before they were paid, it was holden that the executor could not have them, and that he would not have been liable if the testator had been ruled to pay them.

But *The Court* (stopping *Manley* in support of the rule) said this came expressly within the words of the stat. 5 *W. & M. c. 11. s. 3.*, which are "that the said recognizance shall not be discharged till the costs so taxed shall be paid." And they made the Rule absolute.

(a) 2 *Str.* 874.

Wednesday,
Nov. 27th.

BYROM *against* JOHNSON.

Reference to
the Master to
compute
what is due
in covenant
for non-pay-
ment of rent.

ROBINSON obtained a rule calling on the plaintiff to shew cause why it should not be referred to the Master to compute what was due for the rent; this being an action of covenant, wherein the only breach assigned was non-payment of rent; and the defendant having suffered judgment to go by default,

Pell now shewed cause against the rule; contending that the sum to be recovered was uncertain; depending on the one hand upon the question whether or not the jury would give damages for the detention of the rent, the arrears being considerable; and on the other, whether or not any deduction were to be made for repairs &c, of which the defendant might avail himself. And he referred to the cases of *Maunsel v. Lord Massareene (a)*, and *Messin v. Lord Massareene (b)*, where similar motions were refused, though there was nothing to ascertain in either case but the value of foreign money, which in it's nature is more easy to be computed than the quantum of damages or the amount of deductions in this case. But

Per Curiam. The action is brought for a sum certain, which can as well be ascertained by the Master as by a jury, without putting the parties to the expence of executing a writ of inquiry. As to the possibility of the jury giving damages for the detention of the debt, the same answer might be given to every such application where the action is brought upon a bill of exchange: but in those

(a) *Ante*, 5 vol. 87.

(b) *Ante*, 4 vol. 493.

cases it is now become the common practice, upon application, to refer it to the Master to compute what is due. And there seems to be no greater difficulty in computing what is due in this case, where the only breach assigned is non-payment of rent. The like motion was lately granted in case of a mortgage (a).

Rule absolute (b).

(a) *Berthen v. Street*, ante, 326.
also 8 Hen. 6. 5. a.

(b) See *Theluffon v. Fletcher*, Dougl. 316; see

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BYROM
against
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MOUYS *against* LEAKE Clerk, and JONES.

Thursday,
Nov. 28th.

THIS was a rule calling upon the plaintiff to shew cause why the defendant *Leake* should not be discharged out of execution, and why a deed made for securing an annuity and charging the payment thereof upon benefices with cure of souls to the plaintiff, and the warrant of attorney and the judgment entered thereon, should not be vacated, and why the fieri facias de bonis ecclesiasticis & capias ad satisfaciendum should not be set aside.

By indenture, dated *March* 30th 1792, the defendant *Leake* in consideration of 350*l.* granted to the plaintiff an annuity or yearly rent-charge of 50*l.* to be issuing and payable out of the rectory of *Kencott* and the vicarage of *Watlington* in the county of *Oxford*, and out of the glebe lands tithes &c. to the same respectively belonging, for *Leake's* life, payable quarterly; and for better securing the payment of the annuity *Leake* by the same deed bargained and sold the said rectory and vicarage and the glebe lands &c. to *J. Moore* and his executors for a term of years determinable on *Leake's* death, upon trust to permit *Leake* to take the rents and profits until the annuity should be in arrear for twenty-one days, and then by and out of the rents and profits &c. to pay the plaintiff the said annuity. *Leake* also covenanted with the plaintiff to pay the annuity; and by the same deed the other defendant, *Jones*, also covenanted with the plaintiff to pay the annuity on *Leake's* default. At the same time both the defendants executed a warrant of attorney, authorising *Moore* to enter up judgment against them at the suit of the plaintiff, in an action of debt for 700*l.* for so much money borrowed; "which was given as a collateral security for payment of the said annuity." In the me-

A grant of a rent-charge by a rector or vicar out of his benefice is void by st. 13 Eliz. c. 20.—But if in such a deed of grant, he also covenant personally to pay the said rent-charge or annuity, and give a warrant of attorney to confess judgment as a collateral security for payment of the annuity, this Court will not order the deeds to be delivered up to be cancelled.—If it be agreed by the grantor and grantee of an annuity that the former shall pay the expences of the writings, and he immediately after receiving the consideration-money pay the fair charges of the writings out of that

money, no notice need be taken of it in the memorial, but it may be there stated that the whole consideration-money was paid to the grantor.

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memorial of the annuity the warrant of attorney and the deed were correctly stated, except that no notice was therein taken of the covenant in the deed by the defendant *Leake* to pay the annuity.

In the affidavits in support of the rule, it was stated that though the sum of 350*l.* was paid by the plaintiff, a demand was at the same time made upon *Leake* by one *Neale*, who appeared to be a clerk or agent of *Moore* the plaintiff's attorney, for 40*l.* for law charges and procuration fees, which he (*Leake*) then paid out of the 350*l.* That an execution had been since taken out for 1400*l.* on the judgment signed by virtue of the warrant of attorney.

It was admitted that there had been a mistake in taking out execution for 1400*l.* instead of 700*l.* And in the affidavit in answer to this application, it appeared that it was originally agreed that *Leake* should pay the expence of the writings, in consequence of which he had paid 19*l.* 19*s.* to one *Thomas* on *Moore's* account after receiving the whole consideration-money from the plaintiff; and the deductions or payment of any other sum was expressly denied.

The rule was obtained on two grounds; 1st, That the grant of the annuity out of benefices with cure of souls was void as well by the common and canon law as by the statute 13 *Eliz. c. 20. (a)*; and that all the instruments made to secure it were void; 2^{dly}, That if it were not void on that account, it was void by the annuity act (*b*), because the consideration was not truly stated in the memorial.

Mingay now shewed cause against this rule. Even admitting that the grant of the annuity out of the profits of the livings is void by the statute of *Elizabeth*, still the covenant of the defendants, which is a personal covenant, to pay the annuity, is good. And at all events, the warrant of attorney is not affected by the invalidity of the deed, the consideration of which, as appears by the warrant of attorney, was 700*l.* borrowed. Secondly; the other ground of

(a) Which enacts that no lease of any benefice with cure shall endure any longer than while the lessor shall be resident and serving the cure of such benefice, without absence above eighty days in any one year &c; and "that all chargings of such benefices with cure hereafter with any pension

or with any profit out of the same to be yielded or taken hereafter to be made, other than rents to be reserved upon leases hereafter to be made according to the meaning of this act, shall be utterly void."

(b) 17 *Geo. 3. c. 26.*

the application fails in fact; it appearing by the affidavits filed in answer to the rule that no part of the consideration-money was deducted at the time of payment; and that the sum that was actually paid by the defendant, *Leake*, 19 l. 19 s., was paid as the fair charge for the writings, it having been previously agreed that that expence should be borne by him. In this respect the present case is distinguishable from that of the *D. of Bolton v. Williams* (a); for there the whole consideration-money was never paid to the grantor.

Gibbs and *Plowden* in support of the rule. First; the grant of the rent-charge out of the livings is void by the common, the canon, and the statute, law. It is void by the common law; this comes within the principle of those cases (b) in which it has been holden that the assignment of the half-pay of an officer of the army is void; the profits of livings being given for the dignity of the church, and for the decent support of the incumbents. In *Linw.* 149. it appears that sales and mortgages of benefices were prohibited by the canon law. And in *Vaugh.* 327. it is said that "a lawful canon is the law of the kingdom." But however the grant of this rent-charge may be affected either by the common or canon law, it is clearly void by the stat. 13 *Eliz.*, which was scarcely denied even by the plaintiff's counsel. That statute extends to sales, mortgages, and charges of every kind upon livings; therefore the profits of benefices cannot be charged or taken for the payment of debts. Then if the grant of the rent-charge be "utterly void," according to the words of the statute, the warrant of attorney which was given, not for any other consideration, but as it is expressly stated in the memorial, "as a collateral security for payment of the said annuity," is also void; and the Court will permit the defendants to take advantage of this objection on a summary application, because this is the only opportunity they have to avoid the effect of the warrant of attorney. Then it is said that the defendants' covenants in the deed may be enforced, because they are personal covenants: but, in the first place, the same observation, that applied to the warrant of attorney, is also applicable to these; they are covenants to pay the *same annuity* or rent-charge; and if the grant of the rent-charge be

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(a) 2 *Vez. jun.* 138; and 4 *Bro. Ch. Ca.* 310. | *Lidderdale v. The Duke of Montrose*, ante, 4 vol 248; and *Stone v. Lidderdale*, *Anstruth.* 533.
(b) *Flarty v. Odum*, ante, 3 vol. 681; |

itself

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itself void, the covenants to pay it must also be void. And in the next place, another objection applies to *Leake's* covenant; no notice is taken of it in the memorial. It may be argued thus; that covenant either does, or it does not, vary the security of the annuity: if it do not, then it is void within the statute of *Elizabeth* as well as the grant itself; if the effect of it be to make that a good and personal security, which before was a void security, in that case also it is void within the annuity act, because it is not registered. Secondly, It seems now admitted that the sum of 19*l.* 19*s.* was deducted out of the consideration-money, or (which is equivalent) that it was returned the moment it was paid; and therefore the instruments given for securing the annuity are void under the fourth section of stat. 17 *Geo.* 3. c. 26. Or if it be considered that, as by the terms of the treaty, the grantor was to pay for the deeds, then this sum formed no part of the consideration-money, and then the deeds are void by the first section of that act, because the consideration of granting the annuity is not truly stated. And the following cases were referred to on this point; *Fenner v. Evans*, ante, 1 vol. 267; *Broomhead v. Eyre*, ante, 5 vol. 597; *The D. of Bolton v. Williams*, 2 *Vez. jun.* 138, and 4 *Bro. Ch. Cas.* 310; and *Kirkman v. Price*, 1 *H. Bl. Rep.* 309.

Lord KENYON Ch. J. Many cases have been cited, and the common, the canon, and the statute, law has been resorted to by the counsel for the defendants. But I think that none of the cases cited are applicable to the present. The ground of decision in those cases, in which it was holden that the half-pay of officers in the army could not be assigned was that the officers have no fixed durable interest in it, as the clergy have in their benefices, but that it depends on the bounty of the Crown that allows them certain benefits to enable them to attend whenever their services may be required. The canon law has been referred to, as if all the canons were part of the law of the land. But those canons only that have already been incorporated into our law are considered as part of the law of *England*. Some of the canons indeed mentioned in *Linwood* have been so incorporated: but whether or not the canon, that has been cited from that book, has been received into our law may be known by referring to our statutes. If the canon relied on were part of our law, all the disabling and restraining statutes were nugatory. That before the passing of those statutes there existed a power in ecclesiastical bodies to alienate the possessions of the church, and that there still exists a power in them modified in the manner prescribed

prescribed by those statutes, cannot be doubted; the prohibition on alienations by the clergy is therefore to be learnt from those statutes. I am not prepared to say that the statute 13 *Eliz. c. 20.* may not extend to this case: but I deny that the consequence contended for follows, that therefore the present rule must be made absolute. Even admitting that every thing that was done by the defendant (*Leake*) to charge or to affect the livings directly is absolutely void, still the defendants' argument on this point is not true in its extent: it was said that in no case can the profits of a benefice be applicable to the payment of debts; but if that were so, what is to become of all the process de bonis ecclesiasticis? Now in this case one of the defendants executed a deed, by which he granted an annuity or rent-charge out of certain benefices: this is not malum in se; there is nothing wrong in such a transaction, except as far as it is prohibited by the statute; if indeed there had been any moral turpitude mixed in it, I would have followed it in all its consequences. But a deed that was intended to operate one way, may operate another way, ut res magis valeat quam pereat, if honesty requires it. Then why may not this deed, which was intended to operate as a rent-charge upon the living, have effect as a personal security against the grantor, containing, as it does, a covenant to pay the annuity? A deed of feoffment may, if there be no livery, operate as a covenant to stand seised to uses; and so in many other instances. I will not however give any judicial opinion whether or not this deed be void by the statute of *Elizabeth*, which certainly contains some very strong expressions; the reason of making that act was, because in former times the patron sometimes presented a needy incumbent, who, being content to take the living on any terms, agreed to grant leases in favour of the patron himself. And I should object to any thing being done obliquely that such a statute prohibited being done directly.

But in this case I cannot say that the letter of attorney is void. And that brings me to the remaining question, which arises on the annuity act, whether or not the consideration were truly set forth in the memorial? The objection to this part of the case would be fortified by the various cases alluded to, if they applied: but I think that they are distinguishable from the present case for the reason given by the plaintiff's counsel, that here no part of the consideration-money was withheld from the grantor. If any part of the consideration be kept back, under whatever colour, or if there be any improper concealment with a view of eluding the vigilance of those

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who are to examine the transaction, the whole is void. But here all the consideration-money was paid to the grantor, who, being indebted to the person who drew the writings for the expence of those writings under a previous agreement, immediately paid the amount of the bill: it was a payment to his attorney under the previous contract. There is nothing more unreasonable in this than in his paying any other debt after receiving the consideration-money for the annuity. It is objected also that the covenant in the deed to pay the annuity is not taken notice of in the memorial: but there is no occasion to insert in the memorial all the covenants in a deed, unless they modify the grant itself, as a covenant for redemption of the annuity: this is not required under the register acts for *Middlesex* and *Yorkshire*. On the whole, I cannot say that there has been any improper concealment in the transaction. Therefore I am glad to find that the judgment I am bound to give coincides with my wishes on this occasion, and that the law and justice of the case meet in the same point.

Per Curiam,

Rule (a) absolute.

(a) There was another rule in this case, calling on the plaintiff to shew cause why the execution should not be set aside for irregularity, the execution being for 1400*l.* and the judgment only for 700*l.* But this being merely a mistake, and it appearing by the affidavits that the plaintiff had not levied more than 700*l.*, the Court permitted the plaintiff to amend the execution on payment of costs.

Thursday,
Nov. 28th.DOUGLAS and Others *against* IRLAM.

Writ sued out by plaintiffs as executors, and declaration by them in their own right, held a sufficient variance for discharging the defendant out of custody on filing common bail.

YATES on a former day obtained a rule, calling on the plaintiffs to shew cause why the defendant should not be discharged out of custody on filing common bail, on the ground of a variance between the writ of latitat and the declaration; the writ having been sued out by the plaintiffs, as executors of one *Douglas*, and they having afterwards declared for goods sold and delivered by them, in their own right. And he referred to the case of *Turing v. Jones* (a), where the Court recognized the practice of granting such applications in cases where a plaintiff sued out the writ in his own name and afterwards declared as executor; which, though the converse of this case in fact, ought in principle to govern it.

Topping, who was now to have shewn cause, admitted that he could not distinguish this case from the rule there laid down. And

The Court, being of that opinion, made the

Rule absolute.

(a) *Ante*, 5 vol. 402,

RIDGE *against* HARDCASTLE.Thursday,
Nov. 28th.

KNOLLIS on a former day in this term moved to quash the writ of privilege, which the defendant, an attorney of this Court, had sued out, directed to the mayor &c of *London*, commanding them to supersede all further prosecution in a foreign attachment in the Mayor's court at the suit of the plaintiff, who was an attorney of the Court of Exchequer. This was moved on the authority of *Turbill's* case (a); where it was resolved that an attorney should not have his privilege against foreign attachments in *London*.

An attorney shall not have his privilege against foreign attachments in *London*.

Park now shewed cause; saying that if the motion were granted it would in effect do away an attorney's privilege; because the object of it was to compel the defendant to put in special bail; and that there were contradictory authorities on this subject (b), which should incline the Court to decide the case upon principle. And though privilege cannot be set up against privilege, yet that is only in cases where the plaintiff sues in his own court: but here the plaintiff has no privilege in the city of *London*.

Per Curiam. The case in *Saunders* is directly in point against the allowance of the defendant's privilege. And the reason is given for it by Lord C. B. *Gilbert* in his history of The Common Pleas (c); who, after taking notice of the attorney's privilege, says, "But this is to be understood when the plaintiff can have the same remedy against the officer in his own court as in that where he sues him; for if money be attached in an attorney's hands by foreign attachment in the sheriff's court in *London*, he shall not have his privilege, because in this case the plaintiff would be remediless; for the foreign attachment is by the particular custom of *London*, and does not lie at common law; so that if the attorney should have his privilege, the plaintiff should be without his redress."

Rule absolute.

(a) 1 *Saund.* 67.(b) Vid. *Lodge's* case, 2 *Leon.* 156. *Dy.* 287. a.

(c) 209.

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Thursday,
Nov. 28th.W. CRESSWELL *against* LOVELL and Another.

A co-assignee of a debt arising out of bills of exchange in his own possession may sue in the name of the original creditor, and hold the defendant to bail on his own affidavit, swearing positively as to all the facts required which are within his own knowledge, and to the best of his knowledge and belief as to such as are within the knowledge of his principal and co-assignees.

A RULE was obtained, calling on the plaintiff to shew cause why the defendants should not be discharged out of custody on filing a common appearance, on the ground of the insufficiency of the affidavit to hold to bail, which was as follows; "*W. Redaway* of &c maketh oath that *T. and D. Lovell* of &c. were at the time of the assignment hereinafter mentioned, as this deponent verily believes, justly and truly indebted unto one *W. Cresswell* in the sum of 4820*l.* 0*s.* 11*d.* as indorsee of four several bills of exchange accepted by the said defendants, as drawer of one other bill of exchange accepted by the defendants, and as indorsee of a certain other bill of exchange drawn by the defendants on and accepted by one *John Colin*, the payment of which was refused by the acceptor. And the said *W. Redaway* further saith that the defendants being so indebted to the said *W. Cresswell*, he the said *W. C.* did on the 2d of *Feb.* 1799 duly assign his interest in and title to the said debt so due on the said bills to this deponent; and which said bills of exchange are now in the custody of this deponent as the attorney of the said *W. Cresswell*. And this deponent further saith that subsequent to such assignment from the said *W. C.* to him this deponent he the deponent hath duly sold and assigned two third parts or shares of his interest in the said debt to *J. Jenkins* of &c. and *T. M. Hughes* of &c. And this deponent further saith that he hath not received any part of the said sum of 4820*l.* 0*s.* 11*d.* due on the said bills, nor have the said *W. Cresswell*, *J. Jenkins*, or *T. M. Hughes*, to the knowledge or belief of this deponent; and that the said defendants are now justly and truly indebted unto this deponent and the said *J. Jenkins* and *T. M. Hughes* as assignees as aforesaid in the sum of 4820*l.* 0*s.* 11*d.* for the debts due on the said bills of exchange &c." Concluding with negating any tender to the deponent in bank-notes, or to the other parties interested to the best of his knowledge and belief.

Best shewed cause against the rule; contending that an assignee could not and was not required to swear with more certainty than to the best of his knowledge and belief in respect to those facts which did not fall within his personal observation. *Loveland v.*

Basset, Tr. 16 Geo. 2. (a), Swayne assignee of a bankrupt, and two others, v. *Crammore (b)*; in which last it was holden sufficient for one of the plaintiffs, who was only an assignee, to make the affidavit to hold to bail, though the others could have sworn positively. In this case *Redaway*, who is the real plaintiff, has sworn positively to the material facts; namely, the assignment of the debt from *Cresswell* to him, his own possession of the bills, and to his not having received any part of the money due thereon.

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Mingay and *Lawes* in support of the rule. Admitting *Redaway* to stand in the situation of an assignee, still the affidavit is not positive to any debt being due to any person, even to the best of *Redaway's* belief; but it is argumentative and inconclusive. He swears to the bills being in his hands *as the attorney of Cresswell*; therefore *Cresswell* himself ought to have made a positive affidavit; or at least *Jenkins* and *Hughes* ought to have joined in the affidavit. For non constat but that one of them may have received the money, or that a tender in bank-notes may have been made to one of them, which would be sufficient. But, secondly, if the affidavit were sufficient as to *Redaway's* interest, he ought not to have holden the defendants to bail for more than the sum he swears to be due to himself; for at least as to the residue there ought to have been the affidavits of his co-assignees, swearing positively to the same facts to which he has sworn; namely, as to their not having received payment of the debt, and negating any tender of it in bank-notes.

Lord KENYON Ch. J. It is enough that the person who is beneficially interested in these notes, and in whose possession they now are, swears positively as to those facts within his own knowledge, and to the best of his belief as to the rest. He has no compulsory power over the others to make them join in the affidavit; and if we refused to allow this, the real plaintiff would be without remedy in this case. Nor is there any hardship on the defendants, for they cannot be holden to bail a second time on these bills. The cases cited apply particularly to a case so circumstanced as the present. And though affidavits to hold to bail must in general be positive, yet the Courts from the

(a) Cited in 1 *Wils.* 232.

(b) *Ante*, 4 vol. 176.

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necessity of the thing have relaxed the rule in the instances of assignees of bankrupts and executors, who are only required to swear to the best of their belief. The Court however did not say that those exceptions were the ne plus ultra; but being founded upon principle, other cases standing in pari ratione, and requiring the same relaxation of the general rule, must be governed by the same principle. And that applies to the present instance.

Per Curiam,

Rule discharged.

END OF MICHAELMAS TERM.

C A S E S

1800.

ARGUED and DETERMINED

IN THE

Court of KING'S BENCH,

IN

Hilary Term,

In the Fortieth Year of the Reign of GEORGE III.

IN the last long Vacation (*a*) several changes took place on the bench and at the bar.

On the death of *Eyre* Lord Ch. J. of the Court of Common Pleas, Sir *John Scott*, his Majesty's Attorney General, was appointed to succeed him, and was created a Peer of *Great Britain* by the title of Baron *Eldon* of *Eldon* in the county of *Durham*. His Lordship was also sworn a member of his Majesty's most honourable Privy Council. The motto on the rings, on being called to the degree of Serjeant at Law, was "*Rege incolumi mens omnibus una.*"

Mr. *Chambre*, of the honourable Society of *Gray's Inn*, was appointed one of the Barons of the Court of Exchequer on the resignation of Mr. Baron *Perryn*. On being called to the degree of Serjeant at Law (*b*) preparatory to his going on the bench, he gave rings with this motto, "*Majorum instituta tueri*"

(*a*) Owing to a mistake these promotions were not mentioned in the Reports of last *Michaelmas* Term.

(*b*) As Mr. Baron *Perryn* resigned in the Vacation, just before the Summer circuit, an act of parliament, 39 *Geo. 3. c. 67.*, was passed, authorizing his Majesty to cause a writ to be issued out of Chancery any time before *Michaelmas* Term, returnable immediately, in the said court, for the purpose of calling to the dignity of a Serjeant at Law such person, being a Barrister, as his Majesty

should think fit; and to grant to such person the office of one of the Barons of the Court of his Majesty's Exchequer, &c.

Lord Ch. J. *Eyre* dying soon afterwards, a general act, 39 *Geo. 3. c. 113.* was passed, authorizing his Majesty at any time when a vacancy on the bench happens during the Vacation to call any Barrister to the degree of Serjeant in the same manner, and to appoint such person to the bench; under which act Lord *Eldon* was called and appointed.

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Sir *John Mitford*, his Majesty's Solicitor General, was appointed Attorney General, in the room of Lord *Eldon*.

Mr. *Grant*, the Chief Justice of *Chester*, was appointed Solicitor General, and was knighted.

Mr. *Mansfield* succeeded Mr. *Grant* as Chief Justice of *Chester*.

Mr. *Park* was appointed one of his Majesty's counsel learned in the law.

—In this Term *William Draper Best* Esq. of the *Middle Temple*, Barrister at Law, was called to the degree of Serjeant at Law; the motto on his rings was "*Libertas in legibus.*"

Saturday,
Jan. 25th.

WILKINSON and Others Executors of WILKINSON
against VASS, one of the Bail of CAMPBELL.

The bail have eight days, in which to render the principal, from the return of that writ on which there is an *effectual proceeding* against them. —Therefore where the plaintiff sued the bail on their recognizance, who did not render the principal within eight days, and then the plaintiff died, and his executors brought another action against the bail, it was ruled that the bail had eight days from the return of the process in the second action, in which to render the principal.

THE testator, having recovered a judgment against *Campbell* in *Jamaica*, brought an action of debt on that judgment in this court, to which *Campbell* put in bail; the testator recovered a judgment, and sued out a ca. fa. against *Campbell*, returnable on the *Morrow of the Ascension* in the last year, to which there was a return non est inventus. On the 16th of *May* last *Wilkinson* (the testator) brought an action of debt against this defendant on his recognizance as one of *Campbell's* bail: the latitat, which was returnable the 24th of *May*, was served on the 17th of *May*. The time of *Campbell's* surrendering so as to exonerate his bail expired on the 1st of *June* last, being eight days from the return of the latitat; but he did not surrender himself within that time. In *Trinity* Term last a declaration was filed against *Vass* by *Wilkinson*, (the testator,) to which *Vass* pleaded nil debet; the plaintiff demurred to this plea, and the demurrer book was made up, and a rule was obtained for arguing the demurrer in the same term: but before argument, on the 24th of *June* last, *Wilkinson* (the testator) died. On the 18th of *November* *Campbell* surrendered in discharge of his bail, and gave due notice of it to the plaintiff's attorney. On the 19th of *November* last the plaintiffs (the executors) sued out another latitat against *Vass*, and a declaration has been since filed.

Then *Vass* obtained a rule (a), calling on the plaintiffs to shew cause why the proceedings in that action should not be stayed, on

(a) There was another rule in the action against *Beckford* the other bail, under the same circumstances.

the

the ground that the defendant in the original suit had surrendered within the time allowed by the practice of the Court, namely, before the expiration of eight days from the return of the writ in this suit, which was the effectual proceeding against the bail. The rule was obtained on the authority of *Hoare v. Mingay* (a), and *Medowcroft v. Sutton* (b). In the former of those cases the plaintiff first sued the bail in the wrong court in C. B. and being obliged to begin another action in this court the original defendant surrendered within the time, computing the time from the second, not the first, action; and the Court held the render to be good, "it being before the return of the process in this suit." In the other case in C. B. the bail, having been sued on his recognizance, died before the quarto die post, and another suit being commenced against his executors, it was holden that a surrender of the original defendant within the quarto die post in that suit was sufficient to exonerate the bail, the Court saying that the rule established in the preceding case was "that if the principal be surrendered within four days after the return of that writ in which there is an effectual proceeding, it is sufficient."

The counsel in shewing cause (c) against this rule, after observing that the allowance of eight days in which to surrender the principal was merely an indulgence to the bail, for that before the rule *Tr. 1 Ann. B. R.* (d) they were fixed if the defendant were not rendered before the return of the ca. sa., insisted that as the bail had once had the benefit of the rule of *Tr. 1 Ann.* they were not entitled to the same indulgence a second time. That in point of reason, and on the rule of Court, the bail were not entitled to the indulgence prayed for; and that this application was not warranted by either of the two cases relied upon. That the bail never had the benefit of the eight days' rule in either of those cases after the return of any available process. That in the first of them the action was improperly commenced; and that in the other the action was begun against the bail before the time which was allowed to him to render the principal; but that here, the first action having been regularly commenced, the bail had had the benefit of the rule of *Ann.*

Cur. adv. vult.

(a) 2 Str. 915.

(b) Bos. & Pul. 61.

(c) This case was argued in last Michaelmas Term.

(d) By that rule it is ordered that if the bail be impleaded upon the recognizance,

he shall have liberty to surrender the defendant in discharge of his bail "by the space of eight entire days in full term next after the return of the writ of latitat or other process sued out against such bail" &c.

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 against
 VASS.

Lord KENYON Ch. J. now delivered the opinion of the Court, as follows. We have considered this case again and again, and have looked into the authorities cited, particularly that in the Court of Common Pleas. In point of reason we were a little staggered at first with the claim made by the bail to have the indulgence under the rule of Court, *Tr. 1 Ann.*, at two different times: but we think that the words of that rule made in favor of the bail are too strong to be got over, and that it is better to abide by the words of the rule than to introduce nice distinctions in each particular case. We are therefore of opinion that the bail had eight days in this second action in which to render the principal: and as the principal surrendered himself before the expiration of that time, the present rule must be made absolute to stay all further proceedings against the bail.

It was then suggested at the bar that the case of *Meddowcroft v. Sutton* cited from the Common Pleas was not determined on the rule of this Court *Tr. 1 Ann.*, but on a rule *M. 1654, B. C.*, and on the practice founded on that rule: on which

Lord KENYON Ch. J. said, We do not decide this case on the authority of that case, but on the words of the rule of this court, *Tr. 1 Ann.* And this is not the only instance in which the law grants an indulgence in consequence of the death of one of the parties; for where a testator commences an action in due time and dies, his executor to save the statute of limitations may renew the action within a year after the testator's death in nature of journeys' accounts (a).

Per Curiam,

Rule absolute.

(a) Vid. 1 *Lutw.* 260; *Fitzg.* 172. 290; 2 *Str.* 906.

Tuesday,
 Jan. 28th.

BROWN against COMPTON.

The Stat.
 37 Geo. 3.
 c. 112. au-
 thorised the
 justices of the
 peace "at
 the first or
 second Ge-
 neral Quar-
 ter Session or
 General Ses-

sion to be holden after the passing of the act, or some adjournment thereof" to discharge insolvent debtors under certain circumstances: The justices in S. at an adjourned Session, held just after the act passed, the adjournment being of a Session holden before the act passed, ordered the keeper of the sheriff's prison to discharge an insolvent.—Held 1st, That the adjourned Session had no jurisdiction; 2dly, That the officer was not justified in obeying the order of Session; 3dly, That the sheriff was answerable in damages to the plaintiff, at whose suit the insolvent was in custody, for the act of the gaoler in discharging the insolvent.

damages

THIS was an action of debt against the defendant as sheriff of the county of *Southampton* for the escape of *B. Long* a prisoner in the custody of the defendant in execution at the suit of the plaintiff on a judgment of this Court for 315*l.* The defendant pleaded nil debet; and on the trial before Mr. B. *Perryn* at the *Winchester Lent* Assizes 1798 a verdict was found for the plaintiff with 1*s.*

damages, subject to the opinion of this Court on the following case.

1800.

BROWN
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On the 15th of *August* 1797 *B. Long* being then regularly in the defendant's custody as sheriff in execution, in the manner stated in the declaration, having been in custody on the said execution on the 1st of *January* 1797, and not being charged with any debts or sums of money exceeding in the whole the sum of 1200*l.*, gave the regular notice in the *London Gazette* and also in the Newspapers published in *Hampshire* of his intention to take the benefit of the insolvent act 37 *Geo. 3. c. 112.* at the next General Quarter Session or general Session of the peace to be holden in and for the said county &c, or any adjournment of any General or General Quarter Session of the peace which should happen next after twenty-one days from the publication of the first notice &c. On the 19th of *August* 1797 *F. W. Swanton* Clerk one of the justices of the peace for the county of *Southampton*, in consequence of the petition of *B. Long*, issued his warrant directed "To *John White* keeper of his Majesty's gaol or sheriff's ward at *Winchester* in and for the county of *Southampton*," requiring him to bring and convey the body of *B. Long* before his Majesty's justices of the peace at the next adjournment of the General Quarter Session of the peace to be holden at the *Fleur-de-Luce* Inn *Winchester* in and for the county of *Southampton* on *Saturday* the 16th of *September* 1797 &c. in order that he might apply for and take the benefit of the stat. 37 *Geo. 3. c. 112*; in pursuance of which warrant the keeper accordingly carried *Long* before the adjourned Session holden on *Saturday* the 16th of *September* 1797, when, the keeper having delivered in and subscribed and sworn to a list of the prisoners in his actual custody on the 1st of *January* 1797, a copy of which list had been affixed by him in some conspicuous place in and at the most frequented and usual gate of the prison ten days before the 16th of *September*, the insertion of the notices having been proved, and *Long* having delivered in a schedule of his real and personal estate and taken the oath prescribed by the act, an order was made by the Court at such adjourned Session for his discharge, and he was in consequence discharged out of custody, no part of the said damages having been then or since paid, or the said *B. Long* at any time since retaken. The order appeared on the face of it to have been made at "the General Quarter Session of the peace &c holden by adjournment at the *Fleur-de-Luce* Inn *Winchester* in and for the county of *Southampton* on *Saturday* the

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16th of *September* in the 37th year &c." The said adjourned Session was not an adjournment of any Session commenced after the passing of the act, but of a Session originally holden on the 10th of *July* adjourned by two magistrates to the 24th, and from thence continued by subsequent adjournments until the 16th of *September*. The first original Session holden after the passing of the act was on the 2d of *October* 1797.

This case was twice argued, the first time in *Trinity Term* 1798 by *W. Scott* for the plaintiff and *Burrough* for the defendant, and again on this day by *Gaselee* for the former and *Dallas* for the latter.

Arguments for the plaintiff. First; The order made at the adjourned Session on the 16th of *September* 1797 for discharging *Long* out of custody was a nullity, the justices at that Session not having any jurisdiction to make such order. Secondly; The sheriff is liable in this action for an escape, his agent or servant (the gaoler) having discharged *Long* out of custody without any authority. First, It appears from every part of the stat. 37 *Geo. 3. c. 112 (a)*, under which the order in question was made, that the jurisdiction given to the justices at Session to discharge insolvent debtors was expressly confined to "the first or second General Quarter Session or General Session to be holden after the passing of that act, or some adjournment thereof," that is, "at some adjournment of such first or second Session commencing after the act:" but this order was made at an adjournment of a Session holden before the act passed. Therefore the justices at this adjourned Session not having any jurisdiction over the subject, their order was a nullity; and consequently no one, not even the officers of the court, can justify acting under it. In an anonymous case *Salk. 273.* it was holden that a discharge of an insolvent debtor by a Court not having jurisdiction was illegal and void. In the case of *The Marshalsea, 10 Co. 76. a.* a difference was taken when a Court has jurisdiction of the cause and proceeds in verso ordine or erroneously, there no action lies against the party who sues or the officer or minister of the court who executes the precept or process of the Court; but when the Court has not jurisdiction of the cause, there the whole proceeding is coram non judice, and actions will lie against them without any regard of the precept or process." This resolution is warranted by several cases there

(a) Stat. 1, 2, 3, 5, 10, 11, 37.

referred to; and upon the authority of them many subsequent determinations have been given. *Nicholls v. Walker*, *Cro. Car.* 395; *Hill v. Bateman*, 1 *Str.* 711; *Sbergold v. Holloway*, 2 *Str.* 1002; and *Perkin v. Proctor*, 2 *Wilf.* 382. And though in *Smith v. Bouchier*, 2 *Str.* 994. it is said that the officers would be justified though the judge who had no jurisdiction would not, the editor adds a quære to this, referring to *Cunn.* 127., where Lord *Hardwicke*, in delivering the final judgment of the Court, expressed a contrary opinion, and to *Perkin v. Proctor*, 2 *Wilf.* 385., where the principle established in the *Marshalsea case* was adopted. But even if the Court should be of opinion that the order made at the adjourned Session for discharging *Long* was a justification to the officer, still the defendant is liable, because before that order was made the officer had been guilty of an escape, in carrying the prisoner to the adjourned Session under the warrant of a magistrate who had no authority to issue it. *Secondly*; The gaoler having discharged *Long* out of custody without any legal authority, the sheriff is answerable for his act. The gaoler is but the servant of the sheriff, and therefore the latter is answerable civiliter for the acts of the former. It was formerly doubted indeed not whether such an action *could* be brought against the sheriff, but whether it *must* not be brought against him. *Wainewright v. Griffiths*, *Hardr.* 29; and *Plummer v. Whitcomb*, 2 *Lev.* 158. But it never was doubted but that the sheriff is answerable in such cases. And this general rule was recognized in a late case, *Woodgate v. Knatchbull* (a), where it was holden that the sheriff was liable in an action for treble damages under the stat. 29 *Eliz. c. 4.* for the act of his officer, in taking greater fees than are allowed by that statute.

Arguments for the defendant. First; It is not necessary to shew that the proceedings at the adjourned Session, under which the gaoler acted, were strictly regular; for unless the proceedings were a nullity as being coram non iudice, the officer who obeyed the order is justified. Now the justices at the Session had a general jurisdiction over the subject-matter. The whole jurisdiction is vested in the justices assembled at Sessions; the mention of the first and second Sessions after the act is merely to point out at what time that jurisdiction is to be exercised; and if the justices at this Session have not followed the directions of the act, it is

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(a) *Ante*, 2 vol. 148.

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merely an improper exercise of their jurisdiction. The distinction taken in the *Marshalsea case*, and now relied upon by the plaintiff, shews that if the Court had jurisdiction of the cause, though they acted erroneously, the officer who executes the process is justified. Here no objection can be made to the *place* where the justices exercised their jurisdiction, for it was in the proper county; nor to the *persons* over whom it was exercised, or the *subject-matter*, because the person discharged was an insolvent debtor, and the cause of discharge is within the words of the act of parliament; nor to the *persons* exercising the jurisdiction, because authority is expressly given to the justices assembled at Sessions; and the only objection is *to the time* when the jurisdiction was exercised: but this, though improperly exercised in that respect does not render the proceeding itself a nullity. Besides the justices had authority to hold a General Session at the very time when this proceeding was had; and no blame can be imputed to the sheriff if they have erroneously exercised their authority in a court improperly stiled, when in another court properly stiled the same persons might at the same time have exercised this authority legally. It is to be observed that the act specifies no time for exercising this jurisdiction; and if they had general jurisdiction, then by the authority of the case of the *Marshalsea* the officer is justified. But even if the justices had no jurisdiction to make the order in question, the officer is justified in obeying it. The officer acted merely ministerially; and it would be attended with mischievous consequences, if in each particular case such an officer were to exercise his judgment whether he would obey an order of Sessions. In *Smith v. Dr. Bouchier* (a), where the Court had no jurisdiction, it was said "The officer and gaoler might have been excused if they had justified without the plaintiff." And this very point was expressly decided in *Orby v. Hales*, 1 *Ld. Raym.* 3., where "it was adjudged that if the justices of the Quarter Sessions make an order by virtue of 2 *W. & M. c.* 15. for the discharge of poor prisoners, which order is not warranted by the statute, (as if the prisoner were in execution for more than 100*l.*) and the sheriff discharged the prisoner accordingly, he shall not be liable to an escape." And though a quære is added at the end of the case by the reporter, the case itself is recognized as law in 4 *Mod.* 353. Secondly, But if the plaintiff can maintain an

(a) 2 *Stra.* 994.

action against any person for this escape, he should have sued the gaoler, not the sheriff. Though it be true in general that the sheriff is responsible for the act of the gaoler, the reason on which that rule is founded, namely, that the principal has the control over the agent, does not apply to this case, because in this instance the legislature have recognized the gaoler as well as the sheriff, and made him immediately responsible for every thing done by him under this act of parliament. The fifth section authorizes a magistrate to issue his warrant to the sheriff *or gaoler*; Sect. 11. authorises the Sessions to order the sheriff *or gaoler* to discharge the insolvent. In this instance the order is directed not merely to the gaoler generally, but to the gaoler by name, "To *J. White* keeper of his Majesty's gaol or sheriff's ward at *Winchester*." The gaoler therefore is the person who has permitted this escape; it was his immediate act; and he only is liable to the plaintiff, there being no privity in this case between the sheriff and the gaoler.

Arguments in reply—On the first point, the defendant is obliged to assume one thing in the argument, which cannot be granted, namely, that the justices at Sessions had a general jurisdiction over the subject. By their commission they have no such jurisdiction: by that they can only hear and determine offences against the peace. 2 *Hawk. l. ii. c. 8. s. 27. 30.* And though a jurisdiction is given by this act to the justices who may be assembled at a particular Session, the order in question was made before the time arrived when such a Session was holden; and consequently the justices at this adjourned Session had no other jurisdiction than any other individuals. The objection is not merely that the justices, having a jurisdiction, exercised it at an improper time, but that at this adjourned Session holden at the time when the order in question was made they had no jurisdiction over this subject. This is like one of the cases put in 10 *Co. 76. b*; "So where the sheriff, who is prescribed by the lord to hold his turn within the month after *Michaelmas*, holds his turn after the month, and takes an indictment of robbery at the same turn, and the indictment is by certiorari removed into the King's Bench, by the advice of all the justices the party so indicted was discharged, because the indictment was utterly void and coram non judice, forasmuch as at that time the sheriff had not authority to hold the court." Then if the adjourned Session had no jurisdiction, the cases before cited shew that the officer is not justifiable; and though the contrary is said to have been ruled in *Orby v. Hales*, it may be observed that

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the note of that case was not taken by Lord *Raymond* (a) himself, and that all the other authorities are against it. The argument on the second point also proceeds on a supposition that the act of the gaoler was done under the statute: if the statute applied to this case, the answer to that argument would be, that the direction of the warrant "*To the keeper of the sheriff's ward &c*" shews that the act was done by the deputy of the sheriff, as such: but as that statute does not apply to, or authorise, the order that was made for discharging the insolvent, this cannot be distinguished from the ordinary case where the gaoler permits a prisoner to escape, in which case it is clear according to all the authorities that the sheriff is responsible.

Lord KENYON Ch. J. Considering that this action was brought against a person on whom a burdensome office had been imposed without his concurrence for an act done by his servant without his personal knowledge, and which act the servant thought he was bound to do in obedience to an order of Sessions, made by a Court (as he imagined) having competent jurisdiction, we thought that it was a hard action, and that an appeal to the wisdom of the legislature by the defendant for an indemnity would not be made in vain. We knew that in a variety of instances such applications had been made by persons at least as negligent and culpable as this defendant; and made with effect. We knew that not many years ago when a noble Lord (b) had voted in parliament before he had taken the oaths, the legislature anxiously stepped forward to secure him from the penalties of the law, by passing an act of indemnity. We knew also that in the very same session (c) of parliament when this (d) application was made the legislature granted an indemnity to a great body of persons, (the tanners,) who had knowingly violated the laws of their country, in buying rough hides contrary to the stat. 2 Jac. 1. c. 22. There was also another reason that induced us to delay giving judgment for the plaintiff when this case was first argued, a case having been cited from 1 *Ld. Raym.* 3. on behalf of the defendant, which, if it were law, would warrant a judgment in favour of the defendant. The application to parliament however

(a) Lord *Kenyon* observed that this was a note of Mr. *Place*, whose authority was equal to that of Lord *Raymond*; that he was reputed to be the author of *Watson's Clergyman's Law*, and was considered as a lawyer of great eminence.

(b) The Marquis of *Lansdown*. Vid. stat. 37 Geo. 3. c. 22. private act.

(c) 39 Geo. 3. c. 54.

(d) Between the first and second arguments of this case a bill was brought into the House of Lords, to indemnify the sheriff, and it had the approbation of the Judges, on a reference to them: but it did not pass into a law.

having

having been ineffectual, it is now our duty to dispose of the case. I confess that I wish I could have decided it in favor of the defendant, for the reasons before given: but no such wish will induce me to decide contrary to law; and after the best consideration that I have been able to give to this case I find myself reluctantly bound to give judgment for the plaintiff. Though the case has been ably argued on behalf of the defendant, I cannot assent to one of the propositions that his counsel wished to establish, namely, that the justices at the Sessions had a general jurisdiction over the question; that certainly is not true. Under the general commission of the peace no jurisdiction of this kind is given to them: this act of parliament indeed has given a jurisdiction to certain justices, which might have been given to persons of any other description; the jurisdiction is given to the justices of the peace, when assembled "at their first or second General Quarter Session or General Session of the peace to be holden after the passing of the act, or at some adjournment thereof." But the Court, at which the order for discharging the prisoner was made, was neither the first or second General Quarter Session or General Session holden after the act passed, or an adjournment of such Session. If this had been at a General Session holden after the passing of the act, the sheriff would have been indemnified in obeying this order: but the stile of this Court is against him; it is "at the General Quarter Session of the peace holden by adjournment on the 16th of *September* 1797;" and this appears to have been an adjournment of a Session holden before the act passed. This adjourned Session therefore had no jurisdiction over the question. Then it was argued that what was done by the keeper was done by him in his own individual character, not as the servant of the sheriff, and that the sheriff is not answerable for it: but I cannot subscribe to that doctrine. In deciding this case we must take care that we do not break through any rule of law; and the general rule, respondeat superior, applies to this case. As this was an escape permitted by the gaoler, the sheriff is responsible for it. With regard to the case in 1 *Ld. Raym.* 3., relied upon by the defendant's counsel; though it is also alluded to in 4 *Mod.* 353, it is directly against the *Marshalsea Case* and the current of authorities founded upon that, and therefore it cannot be considered as law. On the whole then I am of opinion that the adjourned Session that liberated this prisoner had no authority to make the order, and that the defendant, (the sheriff,) whose servant discharged

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charged the prisoner, is answerable to the plaintiff in this action.

GROSE J. The questions in this case are, 1st, Whether or not the officer, acting under the order of a Court not having jurisdiction, be responsible; and 2dly, Whether or not the justices, assembled as they were at an adjournment of a former Session, had any jurisdiction in this case. The first is, I think, a question not now to be disputed, that point having been settled in the case in 10 *Coke*, *The Marshalsea Case*, which has been considered as the fundamental law on this subject ever since. I take it therefore to be a clear proposition that if a Court, not having jurisdiction, order an officer to do an act, and the officer obey the order, he is not justified. I confess I was surprised when the case from 1 *Ld. Raym.* 3. was cited; because, if it were law, it would overturn the *Marshalsea Case* and all the other authorities on the subject. It is said to be a note taken by Mr. *Place*, whose notes in general are very accurate; the case is said to have been determined in the Court of Common Pleas when *Treby* Ch. J. presided there, and therefore it deserved considerable attention before we declared it not to be law: but after attentively considering this together with the other cases, I think it is not of sufficient weight to overturn them, and it certainly cannot be reconciled with them. Therefore I agree with the doctrine laid down in 10 *Coke*, that an officer is not justified who acts in obedience to a Court that has no jurisdiction. The next question is whether or not the persons who set at this adjourned Session formed a court having jurisdiction over the subject? on reading the words of the act of parliament I am of opinion that they did not. The words, "first or second General Quarter Session or General Session to be holden after the passing of the act, or some adjournment thereof," mean an original Court of Session holden after the passing of the act, or an adjournment of such a Session, and not an adjournment, holden after the act, of some Session preceding it. This adjourned Session was neither an original Session holden after the act passed, or an adjournment of any such Session, and therefore that Court had no jurisdiction. Then it was contended that on the words of this act of parliament the sheriff is not liable in this action, but that the action should have been brought against the gaoler: but I think that the words "or gaoler" were inserted in the act in order to apply to those places where the gaoler or keeper of the prison has an authority of his own independent of the sheriff, and not to those

cases where the gaoler acts as the deputy or servant of the sheriff. But in this case the gaoler has no authority of his own; he acts under the sheriff; this is the sheriff's gaol; and this order was virtually directed to the keeper acting under the sheriff, for it was directed "to *J. White* keeper of his majesty's gaol or *sheriff's ward* at *Winchester*." On these grounds therefore I am of opinion that this officer, having acted under a court not having competent jurisdiction, is not justified, and that this action may be maintained against the defendant.

LAWRENCE J. Every one who hears this case must be sensible of the hardship of it on the sheriff, against whom this action is brought for having obeyed the order of a court that he thought had jurisdiction. This is not a case in which the hardship is equal to both parties; for, notwithstanding the order for discharging the insolvent, the plaintiff might have retaken him (a). But as the different parts of this case have been so fully discussed on the bench, it is not necessary to add much to what has been already said. I will therefore only take notice of one of the defendant's arguments which, I think, cannot be supported. It was said that as the act of parliament mentions the gaoler as well as the sheriff, and as the warrant was directed to the gaoler, he is the person to whom the plaintiff must have recourse: but that argument assumes that this adjourned Session had jurisdiction; for if not, the gaoler who is a servant of the sheriff has permitted the prisoner to go at large without any authority, and then the general rule applies that the sheriff is responsible for the act of his servant or deputy.

LE BLANC J. As this is a case of great hardship on a public officer, and as a case was cited, from 1 *Ld. Raym.* 3., on the first argument directly in point for the defendant, it became the Court well to consider the case before they gave judgment. But after it has been so ably discussed I cannot entertain a doubt upon it; and I do not think that the case cited from Lord *Raymond* can be relied upon as the foundation of a decision in favor of the defendant. It is admitted that, if the justices at this adjourned Session had no jurisdiction, the officer is liable: but the defendant's argument is that the justices had a general jurisdiction and have only acted erroneously, that the act of parliament has recognised the gaoler as well as the sheriff, and that the former only is responsible in this case. That the justices of the peace have not a

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general jurisdiction seems clear; because independently of this act of parliament the Court of General Session, or General Quarter Session, has no jurisdiction or authority over a person charged in execution in a civil suit. The only authority vested in them is given by the act of parliament; therefore we must look to the act to see what that authority is. Now that authority is given to the justices "at their first or second General Quarter Session or General Session of the peace after the passing of the act:" but before such a Session could be holden the gaoler, who is the sheriff's servant, obeyed the warrant of a magistrate in carrying the prisoner to an adjourned Session, and he afterwards obeyed the order of that adjourned Session made for the discharge of the prisoner, that Session not having any authority to make such an order. The time was not arrived when the jurisdiction was to be vested in the justices at their Sessions: and if no court were holden in which the jurisdiction could be vested, then the act of parliament did not attach so as to let in the distinction which was attempted to be taken by the defendant between the case of the gaoler and that of the sheriff; for if the court did not exist in which the jurisdiction was vested, the sheriff is in the situation of an officer, who, having the custody of a prisoner, suffers him to be at large without any authority. On the grounds therefore that the single magistrate in the first instance had no authority to issue his warrant, and that the Session afterwards had no authority to make the order in question, I am of opinion that the action may be maintained, and that it may be maintained against this defendant.

Postea to the plaintiff.

Tuesday,
Jan. 28th.POLLARD and Another *against* BELL.

A warranty of neutrality in a policy of insurance is not falsified by a sentence of a foreign court of Admiralty condemning a ship for navigating contrary to the ordinances of that belligerent state, to which the neutral country had not assented.

THIS was an action on a policy of insurance on goods on board the ship *Juliana*, "warranted a *Dane*," on a voyage at and from *London* to *Teneriffe*, with liberty to touch at *Guernsey* and *Madeira*. The defendant subscribed the policy as an underwriter for 200*l.* at a premium of four guineas *per cent.* The policy was effected by the plaintiffs as agents on account and for the benefit of certain persons resident in the island of *Teneriffe*, in whom it was averred that the interest was. There were counts in the

declaration

declaration for a total loss by capture, and for money paid, and for money had and received. The defendant pleaded the general issue, and paid the premium into court. And at the trial a verdict was taken for the plaintiff, subject to the opinion of this Court on the following case.

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The persons for whose benefit the policy was effected were at the time of making it and still are resident in *Teneriffe*. The *Juliana* was a Danish ship and the property of Danish subjects; and previous to the voyage insured had a passport signed by the King of *Denmark* for a voyage from *Copenhagen* to ports in the *East Indies*. *Eggleston* the captain of the ship sailed from *Copenhagen* on the 23d of *June* 1796, having on board a partial cargo of tar, pitch, cordage, cables, pump leather, *French* brandy, sailcloth and coals, and in pursuance of the verbal instructions of the owners of the *Juliana* arrived in the *Thames* on the 23d of *July* 1796. During his stay in the said river he took on board a quantity of goods on account of the owners of the ship, and also the goods on which the policy was written; and, having taken out his clearances for *Guernsey* and *Madeira*, on the 23d *August* 1796 he sailed on the voyage insured. At *Guernsey* he took in additional goods on account of the ship-owners; and, proceeding from thence on the 27th of *August*, was captured on the 18th of *September* by a *French* privateer, *La Dorade*, and carried into *Bordeaux*. At the time of the capture and during the whole voyage insured the *Juliana* had on board the passport abovementioned, and every other document usually carried by Danish ships. She had also a roll d'equipage, containing the names and places of nativity of the officers, but not of the crew, only stating the latter generally to be sixty men of colour. Captain *Eggleston* who was master of the ship for the voyage insured was born in *Scotland* of *British* parents under the allegiance of the King. He was not naturalized in *Denmark*; but on the 6th of *October* 1794, posterior to the war between *England* and *France*, he obtained letters of burghership in *Denmark*, but had no domicile there, never having resided there. Upon the ship's arrival at *Bordeaux*, proceedings were instituted by the captors before the tribunal of commerce, by which Court the ship and cargo, with the exception of one bail of goods, were condemned as prize. From this sentence Captain *Eggleston* appealed to the civil tribunal of *La Gironde*, where there was a general sentence of condemnation. [These two sentences were set forth at large in the special case: but being unusually long and complicated,

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complicated, introducing a variety of irrelevant matter and false reasoning, they are here omitted, as they could not fail of disgusting every person on whom the task of reading them should be imposed. It may be sufficient to state that they recited several *French* ordinances, particularly one in 1778, by which it is declared that all ships shall be confiscated "wherever there shall be found on board a supercargo, merchant, commissary, or *chief officer being an enemy*;" and that this Court were of opinion that it appeared on the sentences themselves that this ship was ultimately condemned for a violation of that ordinance, the captain being a *Scotchman*]. From this sentence Captain *Eggleston* appealed to the supreme tribunal of cassation at *Paris*, which decreed as follows; "Having heard the parties, the tribunal considering that it hath been fully proved by the confession of Captain *Eggleston* and ascertained by the Judges of *La Gironde* that the said Captain *Eggleston* was born in *Scotland* and an enemy; that his denization in a neutral country was not justified according to law; that his quality of enemy sufficed to legitimate the prize; that the fact of Captain *Eggleston* being a *Scot* and enemy existed independently of the papers on board; that in consequence all remedies of nullity drawn either from the withdrawing of some of the papers on board, or from the non-application of the seal to the bag wherein they were inclosed, cannot give any ground to cassation; rejects the request of *Charles Eggleston*, and condemns him to the fine of 150 francs."

This case was twice argued, the first time in *Michaelmas* Term last by *Park* for the plaintiff and *Carr* for the defendant, and now by *Gibbs* for the former and *Rous* for the latter; and judgment was now given for the plaintiff.

LORD KENYON Ch. J. This is an action on a policy of insurance on goods on board a ship, warranted to be a *Danish* ship: a loss having happened, the defendant resists the plaintiff's claim, because (he says) that the ship in question was not, what she was warranted to be, *Danish*; and I agree with the defendant that the meaning of the warranty was not merely that the ship was *Danish* built but that she should be circumstanced during the voyage as a *Danish* ship ought to be. This does not appear to me to be a case of difficulty, though it is of great importance to the public. This is one of the numberless questions that have arisen in consequence of the extraordinary sentences of condemnation passed by the

the Courts of Admiralty in *France* during this war. I do not think that they were characterized too strongly at the bar, when it was stated that they all proceeded on a system of plunder: but still until the legislature interferes on this subject, we sitting in a court of law are bound to give credit to the sentences of a court of competent jurisdiction. If therefore in this instance the *French* courts had condemned this ship on the ground that it was *Danish* property, we should have been concluded by that sentence in this action, and must (however reluctantly, it being stated as a fact in the beginning of the case that it was a *Danish* ship,) have given judgment for the defendant. This is proved by the different cases cited in the argument, with the decisions in which I concur, and it is supported by reason. To a question asked in the course of the argument, what are the rules on which the courts of Admiralty profess to proceed, I answer, the law of nations, and such treaties as particular states have agreed shall be engrafted on that law. It was said however by the defendant's counsel that an arrêt has the same force as a treaty: but, without stopping to enlarge on the difference between them, it is sufficient to say that the one is a contract made by the contracting parties, and that the other is an ex parte ordinance made by one nation only to which no other state is a party; and I concur with Lord *Mansfield* in opinion, that it is not competent to one nation to add to the law of nations by its own arbitrary ordinances without the concurrence of other nations. That is the ground on which this case must be decided. Now let us see what was the foundation of the condemnation in the *French* courts? It is stated in one of the sentences, that by their own ordinances all ships are to be confiscated "whensoever on board these ships shall be found a super-cargo, merchant, commissary, or chief officer, being an enemy." But I say that they had no right by making such an ordinance to bind other nations. Then was the ship in question condemned on the ground that she was not *Danish* property? Certainly not. A vast variety of circumstances, wholly irrelevant, are set forth in the sentences: but it appears clear beyond all doubt that the ship was at last condemned on the ground that the captain was one of those persons whom by their own ordinances only they wished to proscribe. This case cannot be distinguished from that of *Mayne v. Walter* (a); though even without the authority of that case I should have had no hesitation in deciding in

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(a) *Park Insur.* 414.

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favour of the plaintiff. On the whole therefore I am of opinion that though, if contrary to justice the ship had been condemned simply because she was not a *Danish* ship, we should have been concluded by that sentence, yet as the courts abroad have endeavoured to give other supports to their judgment which do not warrant it, and have stated as the foundation of the sentence of condemnation one of their own ordinances which is not binding on other nations, this sentence does not prove that the ship in question was not a neutral ship; and consequently the plaintiff is entitled to recover.

GROSE J. This is an action brought on a policy of insurance to recover the amount of the loss stated in the declaration. The plaintiff proved his interest, and the loss, and *prima facie* proved that the ship was *Danish*. The defence to the action is, first, that though it is stated that the ship was *Danish*, she was in truth the property of an enemy and therefore not neutral; and secondly, that she had not the proper documents on board to prove that she was neutral. With regard to the first; it is not only not stated as a fact nor to be collected by inference that she was not a neutral ship, but it is expressly stated as a fact in the former part of the case that the ship was a *Danish* ship and the property of *Danish* subjects. If this had been found as a fact on a special verdict, it would have been conclusive, and we could not have inferred the contrary from the sentence; but referring to the sentence it comes to this, that it there appears that the ship was a *Danish* ship, unless the circumstance of the captain's having been born in *Scotland* is evidence to shew that it was not a *Danish* ship: but I find nothing to warrant that either in our own law or in the law of nations. In the case of *Mayne v. Walter* the court of Admiralty in *France* condemned the ship because she had an *English* super-cargo on board, which was contrary to one of the *French* ordinances: but this court did not consider that the circumstance of a neutral ship having on board an *English* super-cargo was a breach of neutrality. So here this ship having on board a captain a native of *Scotland* is no proof that the ship in question was not neutral. As to the second question; if the ship had been condemned for not having the proper documents on board, we must have decided in favour of the defendant. But it appears by the case that in point of fact she had "every document usually carried by *Danish* ships." I admit that if the ship had been condemned generally as a lawful prize, our law would have considered that as a denial of her neutrality; or if the ground of the

sentence of condemnation had been that the ship was not neutral, that also would have been conclusive in this action. But by referring to the last sentence which I consider as the sentence of a court of dernier resort, it evidently appears that she was condemned because the captain was born in *Scotland* and an enemy; for that sentence runs thus, "Considering that it hath been fully proved by the confession of Captain *Eggleston*, and ascertained, &c. that the said Captain *Eggleston* was born in *Scotland* and an enemy; that his denization in a neutral country was not justified according to law; that his quality of enemy sufficed to legitimate the prize; that the fact of Captain *Eggleston*'s being a *Scot* and enemy existed independently of the papers on board; that in consequence all remedies drawn either from the withdrawing of some of the papers on board, or from the non-application of the seal to the bag wherein they were included, cannot give any ground to cassation, &c. condemns, &c." I admit that that sentence conclusively proves that the captain was a *Scot* and an enemy; but it does not prove that the ship was not *Danish*, nor that she had not the proper documents on board for a *Danish* ship; we cannot by the law of nations say that for the reason here given the ship was not neutral. If it had been necessary to consider the two first sentences and to have extracted the clear grounds of decision from them, I should have found myself under considerable difficulties. That they are not like each other is perfectly clear; for in the first the ship and cargo are condemned with an exception; but the second is a general sentence of condemnation without any exception. But it is clear that the ship was ultimately condemned because the captain was a *Scot* and an enemy. And in this view of considering the case, I do not think that by determining in favour of the plaintiff we shall shake the authority of any former decision. My opinion then on the whole is, that as the ground of the sentence of condemnation was an infringement of an ordinance of one state, it does not appear by that sentence that the ship was not, what the jury have found here to be, a *Danish* ship, or that she was condemned for having, by an act contrary to the law of nations, forfeited her neutrality.

LAWRENCE J. There are two questions in this case; first, what is the ground of the sentence of condemnation; secondly, if the warranty of neutrality is thereby falsified; for if it be, according to all the authorities that is conclusive here. On the first question; the clear ground of condemnation was that the owner and master

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had acted contrary to *French* ordinances. The second sentence, after enumerating various causes contrary to their own ordinances, concludes thus; "Accordingly by making reference to the provisions of the maritime laws and regulations from which the decrees of the Executive Directory are merely the emanation, and to the facts proved by the papers of the proceedings, it is fully decided that the ship *Juliana* and her cargo ought to be pronounced a legal capture to be seized and confiscated for the benefit of the fitters out of the privateer the *Dorade*, as being found nearly to have incurred all the cases they have provided against," that is, which those laws and regulations and decrees have provided against. From that sentence there was another appeal, and there the only ground of the sentence is that the captain of the ship was born in *Scotland* and an enemy, for they say "that his quality of enemy sufficed to legitimate the prize." But why? Because it is provided by one of their own ordinances that if there shall be found on board any ship whether neutral or the ship of an ally any officer belonging to an enemy's country the ship shall be confiscated. That being the ground of the sentence of condemnation, the next question is whether that has negatived the warranty of neutrality? The warranty of neutrality does not induce any necessity to comply with the peculiar regulations of the belligerent powers. For if a ship be captured, and the question be whether she be neutral or not, the general rule for judging and deciding on that point is the law of nations, subject to such alterations and modifications as may have been introduced by treaties: but where the law of nations has not been varied or departed from by mutual agreement, that is the general rule for deciding all questions on matter of prize. This is clearly laid down in the state paper signed by Sir *George Lee*, Dr. *Paul*, the King's Advocate, and Sir *D. Ryder* and Mr. *Murray* then Attorney and Solicitor General, in answer to the *Prussian* memorial, concerning neutral ships (a). When therefore a state in amity with a belligerent power has by treaty agreed that the ships of their subjects shall only have the character when furnished with certain precise documents, whoever warrants a ship as the property of such subject, should provide himself with those evidences which have by the country to which it belongs been agreed to be the necessary proof of that character. In requiring this no difficulty is imposed, of which the assured is not aware, and which may not be in his power

(a) Vid. *Collectanea Juridica*, 1 vol. 33.

to prevent: but to require of him to furnish himself with every document the belligerent powers may require, and to insist that the warranty is not complied with unless the ship be navigated according to their ordinances and regulations, would be to deprive the assured of his indemnity for the want of papers &c, of the necessity of which he may fairly be presumed ignorant, and which papers it may not be in his power to procure: for how can the officers of one country be called on to grant that which the laws of their own country do not require? These *French* decrees are regulations made with some view to the laws of *France*, but are not applicable to the subjects of any other country. In examining the cases decided on this point, it will not be found that there is any determination of the court to support what has been insisted on by the defendant; but on the contrary it has been settled in many cases that a condemnation on the particular ordinances of a belligerent power is no violation of a warranty of neutrality. In the case of *Bernardi v. Motteux* (a) the ship *Joanna* was warranted neutral; the only doubt was whether the ship were condemned as being the property of an enemy, or for violating a *French* arret by throwing papers overboard; for the one or the other of those causes she was condemned; if she were condemned for the first, namely, that she was not neutral, the plaintiff clearly could not have recovered; nor could he have recovered, if she were condemned on the other ground, according to the argument of the defendant in this case: But it is clear that the court did not in that case adopt the defendant's argument here, because the plaintiff did recover in that case, it not being certain that the ground of condemnation was that the ship was the property of an enemy. But the case chiefly relied on by the defendant here is that of *Barzillai v. Lewis* (b), which was decided on the ground of a non-compliance with the treaty of *Utrecht*, and on the sentence having condemned the ship as *English*. According to a manuscript note of that case, taken by Mr. J. Buller rather more full than that in print, Lord Mansfield began his judgment by stating the sentence of the court of Admiralty as being conclusive, and that the question was on the meaning of it. He afterwards observed that the ship was insured by her *Dutch* name, and that the underwriters took it for granted that she was so, but that when this was sifted in *France* she appeared to have none of the requisites to shew that she was neutral property, for

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(a) *Dougl.* 575.(b) *Park Insur.* 410.

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that she had never been in a *Dutch* port, and that the sea brief was not conformable to the treaty of *Utrecht*; and he concluded by saying that the ship was condemned as an *English* ship, and that it was not open to this court to inquire whether that sentence were right or wrong. So here if the ship had been condemned as an *English* and not a *Danish* ship, we should have been concluded by it. In that case Mr. J. Willes and Mr. J. Ashburst concurred; and Mr. J. Buller said, "The first sentence seems to have been on particular arrears. The second appears to go on the ground of property, for the name is changed, and they do not go into evidence as to the muster-roll or situation of the crew as to there being more than two-thirds *English*. The other ground is more general and makes it immaterial whether it was on the one ground or the other; for if she were not so documented as to have the protection of a neutral ship, the warranty is not complied with." It is true that Lord Mansfield in the course of giving his opinion in that case used some expressions which may be applied to support the defendant's argument here: but it is clear that the ground on which he decided was a non-compliance with what was agreed by the treaty of *Utrecht* should be a necessary document to prove the ship to be *Dutch* property; and this was the express ground of the opinions of the other judges. That Lord Mansfield could not in that case intend to say that a non-compliance with the ordinances of *France*, not adopted by any treaty, was a forfeiture of neutrality, appears from the case of *Mayne v. Walter*, where the plaintiff recovered; he there pointedly shewed how such ordinances might become binding, by observing that the whole case turned upon the treaties between *France* and *Portugal*, about which both parties were silent; and there it was holden that the circumstance of having an *English* super-cargo on board was no ground to defeat the Plaintiff's right to recover on a policy on a ship warranted to be *Portuguese*. In a subsequent case, *Saloucci v. Johnson* (a), there were two grounds of condemnation, one that the ship would not stop to be searched, the other, that she had not a charter party on board, as required by an ordinance of *Spain*; on the latter, Mr. J. Ashburst said (according to his own note,) "As to the next question, her not having a charter party; this clearly is not required by the law of nations; and it appears by the case that she was a general ship, and though she acted contrary to a particular

(a) *Park Insur.* 415.

ordinance of *Spain* other nations are not bound to take notice of such ordinance unless in virtue of some treaty subsisting between two states, by which they submit to be bound by such ordinance; that is not the case here." So that the doctrine on which the case before us is determined was distinctly recognized there. The argument of the defendant here is that the sentence of condemnation is conclusive on the point that the ship was not navigated according to the contract between the parties: the contract between the parties is that she was a neutral ship; but the sentence has not decided that point; it has only decided that she was not navigated according to the ordinances of *France*, but that was no part of the plaintiff's contract. In deciding this case in favour of the plaintiff we do not take upon ourselves to say that the sentence of the *French* court of Admiralty is erroneous: all that we determine is that the *French* court has not decided that which would be a breach of the warranty of neutrality. On the whole I think it is clear that the ship in question was condemned for acting in contravention of *French* ordinances, and that that does not falsify the warranty of neutrality.

LE BLANC J. This case has been already so fully gone into by the bench that little remains for me to say; I shall therefore content myself with expressing my concurrence in the opinion given by the court, and shortly stating the grounds on which I have formed that opinion. On examining the sentences in the different courts of *France* we cannot collect that the ship was ultimately condemned because she was not a *Danish* ship. As the grounds of condemnation are stated in the sentences themselves, unless we can collect that the ship was condemned as prize because she was not a *Danish* ship, those sentences are not conclusive on this question between the litigating parties. The question in this case is whether or not the ship were *Danish*; in looking through these sentences of condemnation, I do not find that she was condemned as not being *Danish*, or for not having those documents that the law of nations or particular treaties between the respective countries require to evidence her to be a *Danish* or a neutral ship. The sentences in *France*, whether right or wrong, are conclusive on the question of prize; and therefore if the question here had been whether or not the ship had been captured as prize, those sentences would have been conclusive: but that is not the question here; the only question here being whether or not this were a neutral ship at the time of the capture. I admit that in order to comply with the

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warranty of neutrality it was necessary not only that the ship should be a neutral ship but also that she should be properly documented and should be navigated in such a manner as to be entitled to the benefits of neutral ships. But here the ship was condemned for non-compliance with the ordinances of one belligerent power, to which it does not appear that *Denmark* ever consented. Then the question is whether a sentence, appearing on the face of it to have been given on that ground, ought to preclude the plaintiff from shewing that in point of fact the ship was a *Danish* ship? As it does not appear on the sentence that the ship was condemned as not being a *Danish* ship, I think it is competent to the parties to go into proof of that fact. Without repeating the authorities that have been referred to in support of our opinion, I think that the conclusion from them all is this; that the sentence of a foreign court is conclusive on that point that it professes to decide; if it be a general sentence of condemnation, without assigning any reason, the courts here will consider that it proceeded on the ground of the ship's being the property of an enemy; but if the sentence itself professes to be made on particular grounds, and they are set forth in the sentence and appear not to warrant the condemnation, then the sentence is not conclusive as to those facts. Therefore as the sentences of condemnation in this case profess to be made on an ordinance of *France*, to which *Denmark* is no party, they do not falsify the warranty of neutrality as between the parties to this cause, though they may justify the courts abroad in condemning the ship as prize. If the question here had been whether or not the ship had been prize, the sentences abroad would have been conclusive: but the question here being only whether or not the ship were neutral, those sentences are not conclusive on that point.

Postea to the plaintiff (a).

(a) A similar case, *Helstrom v. Rhodes*, standing in the paper at the same time received a similar decision without argument. *Wigley*, who was to have argued this case, mentioned that of *De Souza v. Ewer*, *Guildhall Sittings* after *Hil.* 1789, (*Park, Insur.* 361. 4th Edit.) as a direct authority for the defendant; but Lord

Kenyon said that that case came before him at *Guildhall* very soon after he came on the bench when he was not so conversant in questions of this kind as he was now; that he was satisfied he was mistaken in that decision; and consequently that it could no longer be considered as any authority.

The KING *against* the Inhabitants of Bow.Wednesday
Jan. 29th.

AN order made by two justices, for the removal of *George Heard* his wife and children from the parish of *Chumleigh* to the parish of *Bow*, both in the county of *Devon*, was confirmed by the Sessions on an appeal, subject to the opinion of this court on a case reserved. The pauper was settled in *Bow* by apprenticeship. At a *Michaelmas* court leet holden by adjournment for the manor and borough of *Chumleigh* on the 16th of *November* 1792 the pauper was appointed to the office of ale-taster of the borough and duly sworn, according to the custom of the manor, *to execute the said office for one year thence next ensuing or until he should be lawfully discharged from the same.* He accordingly entered upon and executed such office until the 1st of *November* 1793, when at a similar court holden by adjournment for the said borough a new officer was appointed in his stead and sworn in the same manner. The tythingman constables and other officers were appointed at such court in a similar manner. No business is transacted at the original courts, but all officers are appointed at some adjournment thereof. There is only one original court leet in the year for the said manor and borough, and that at some day within the month after *Michaelmas* according to the convenience of the steward.

Gibbs and *East* in support of the order of Sessions. Upon the very statement of the case it appears that the pauper did not execute the office *during one whole year*, according to the express words of the stat. 3 *Will. c. 11. s. 6.* which was necessary to enable him to gain a settlement in *Chumleigh*; for he only executed it from the 16th of *November* in one year to the 1st of *November* in the year following. Nor does it even appear that in the event he was appointed to the office for a year; for the appointment was conditional, being for one year *or* until he should be lawfully discharged; and in fact he was lawfully discharged before the end of the year. But admitting that by relation of law an appointment to an office at an adjourned court would refer back in general to the original court, yet no such relation can take place here, because the appointment was not general but from *thence*, which must mean from the very day of the appointment. And at any rate it would not be alone sufficient if the appointment related back to the original court; for though relations in law are sometimes admitted, yet there cannot be a relation in fact; and the

A., who at an adjournment of a court leet holden 16th Nov. 1792 was appointed to an annual office "for a year or until he should be discharged," and who executed the office until the adjournment of another court leet holden 1st Nov. 1793, did not thereby gain a settlement.

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statute of *William* does not merely require a legal appointment to the office for a year but an actual execution of it for that whole period. In *R. v. Fittleworth* (a), where a certificated man who had been appointed tythingman was removed on his becoming chargeable before the end of the year, the court held that he gained no settlement by virtue of his office, because he had not executed it all the year; and yet the removal in that case did not vacate the appointment.

Clapp and *Dampier*, who were to have argued on the other side, admitted that the words of the statute were strongly against them: but referred to the case of *R. v. The Inhabitants of Newstead* (b) where by an equitable construction of the 3 Will. c. 11. s. 7. it was holden that a hiring and service according to the custom of the country from *Whitsuntide* to *Whitsuntide*, though less by sixteen days than the year, would confer a settlement on the servant.

Lord KENYON Ch. J. That is at least a case of doubtful authority, and perhaps it would have been better if we had never heard of what is called an equitable construction of the statutes relating to settlements. It would have been better in all cases to have adhered to the plain words of the statutes. But this is an attempt to carry the point farther than it was carried in *R. v. Newstead*: this is not an appointment for a year from one moveable feast to another, but from one court until it should please the steward to hold another. The words of the statute on which this question arises are express; and the case of *R. v. Fittleworth*, which has been cited, shews that they have been construed according to their plain and obvious meaning.

Per Curiam,

Order of Sessions confirmed.

(a) *Burr. S. C.* 238. (b) *Burr. S. C.* 669. *Vide Rex v. Uxerstone*, ante 7 vol. 564.

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The KING against the Inhabitants of BATHEASTON.

If a parish certificate be granted to A., and to B. and C. his children by name, the residence of B. and of his family in the certificated parish is protected by it, and a son of B. (not having been emancipated) cannot gain a settlement in the certificated parish by hiring and service.

TWO Justices by an order removed *H. Gay* and his wife and children from *Box* to *Batheaston*: on appeal to the Sessions the order was confirmed, subject to the opinion of this court on the following case.

Edward Gay the grandfather of the pauper, being settled at *Batheaston*, went to live in *Box* under a certificate from *Batheaston*

parish is protected by it, and a son of B. (not having been emancipated) cannot gain a settlement in the certificated parish by hiring and service.

dated *October 21st. 1727*, certifying the said *Edward Gay, Deborah* his wife, and *Edward and Thomas their children*, to be parishioners of and legally settled in *Batheaston*. *Edward* the son named in the certificate, now eighty years of age, continued to live with his father in *Box* until his marriage. He was married there and had issue *Harry Gay* the pauper. The pauper at the age of sixteen was hired to *Mrs. Sheppard* in *Box* as a yearly servant, and lived with her upwards of a twelvemonth. He then worked at day-work in *Box*, then in *Corsham* parish, sleeping constantly at his father's in *Box*; and afterwards when of age he lived several years with *R. Davis* in *Box* under a yearly hiring at five guineas a year and vails; after which service he married his present wife, by whom he had the children mentioned in the order of removal. The question for the consideration of the court is, whether the pauper by such hiring and service gained a settlement in *Box*.

The Counsel in support of the order of Sessions, after referring to *Rex v. Testerton (a)*, to shew that where the son of a certificated person is mentioned by name in the certificate as well as the father, he is considered as a certificated person as much as if the certificate had been granted to him only, and consequently that this certificate prevented *Edward Gay* the son who was named in the certificate and *Harry Gay* his son from gaining a settlement in *Box* by hiring and service, were stopped by the Court.

The Counsel on the other side were endeavouring to shew that *H. Gay* gained a settlement in *Box* by hiring and service; that, if his father *E. Gay* had not been mentioned by name in the certificate, the pauper would not have been restrained from thus gaining a settlement, because it was ruled in *R. v. Darlington (b)* that a parish certificate does not extend to grand-children, and in *R. v. Heath (c)* that when the son of a certificated person marries and becomes the head of a new family he ceases to be under the protection of the certificate granted to his father; and that the circumstance of *E. Gay* (the father of the pauper) being mentioned by name was perfectly immaterial as far as respected this question; that he was there named merely as one of the children of *E. Gay*, senior, to identify him as one of the family of *E. Gay* the elder in case any dispute should afterwards arise respecting the different members of the family; and that it never could have been intended to name him as a *principal* in the certificate, so as to include his

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(a) *Ante* 5 vol. 258.

(b) *Ante* 4 vol. 797.

(c) *Ante* 5 vol. 583.

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family also, it appearing by the case that he was an infant of the age of eight years only when the certificate was granted, and the provisions of the certificate act (a) being applicable only to adults; that policy required that certificates should be narrowed rather than enlarged by construction, according to what was said by Mr. J. Buller in *R. v. Darlington* (b); whereas if the argument on the other side prevailed, this, instead of being a certificate of one person and his family, would be a certificate of three distinct heads of families, including the family of each of those three persons; that this case was distinguishable from that of *R. v. Testerton*, where this question neither did, nor could, arise; that there the question was respecting *the son*, whereas here it was respecting *the grandson*, of the certificated person; that the decision of that case must have been precisely the same though the son, who was removed, had not been mentioned by name in the certificate, and consequently that the insertion of his name in the certificate could not have been the foundation of the opinion there given by the court; that indeed if it had been there decided either that a son of *John Woods* could not have gained a settlement by hiring and service in the certificated parish, or that *John Woods* himself could not have been removed from the certificated parish when he married and became the head of a new family, it would have been an authority in support of the present order, but that neither of those questions arose or was decided, and therefore that case was no authority for the present. But

The Court interposed; saying that the distinction was taken in *R. v. Testerton* between those cases where the certificate is granted to a person and his family generally and those where the son is mentioned by name in the certificate; that in the former a grandson is not within the protection of the certificate, but that in the latter where the son is named, his family until they are emancipated are within the protection of the certificate, not as the grandchildren of the principal person mentioned in the certificate but as the family and children of the son who is also named in the certificate; and therefore they thought that the case of *R. v. Testerton* ought to govern the present case.

Per Curiam, Order of Sessions confirmed.
Gibbs, Jekyll, and Williams, in support of the Order of Sessions.
Durnford, and G. Richards, against it.

(a) 8 & 9 W. 3. c. 30.

(b) *Ante* 4 vol. 803.

The KING *against* The Inhabitants of DODDERHILL.Wednesday
Jan. 29th.

Two justices having removed *Ann Barnet*, the widow of *Wm. Barnet* deceased, and their six children from the parish of *Ipsley*, in the county of *Warwick* to the parish of *Dodderhill*, in the county of *Worcester*, the Sessions on Appeal confirmed the order, subject to the opinion of this court on the following case.

"The settlement of *Wm. Barnet* the pauper's husband, now deceased, was by birth at *Fardebigg*. In 1791 he went to reside in *Dodderhill* in an house of the value of six guineas *per annum*, wherein he continued for three years; during that time being by trade a needle-maker he worked for one *W. Webb* in that trade at six pointing places in his mill, and afterwards *Webb* not having in general use for more than four of them, *Barnet* rented of *Webb* two of the said pointing places for more than one year at the yearly rent of 16*l.*, but *Barnet* was to do all *Webb's* work in preference to that of any other person, although to do it it might be necessary to use all the six pointing places; and *Barnet* was paid by the piece for all the work he did for *Webb*. No two particular pointing places of the six were let to *Barnet*; but by his contract with *Webb* he might have the use of any two he pleased; but work or no work, *Webb* was entitled to his rent of 16*l.* a-year from *Barnet* for his two pointing places. The mill belonged to *Webb*. The pointing places are frames of wood, which support the spindles, on which grinding stones turn, which are moved with great velocity by means of leathen straps communicating with the great wheel of the mill, which is turned by water. The pointing places are placed on the floor of the room, and at each of them a man sits; and the needles are pointed by being pressed against the grinding stones. The pauper did not rent any room in the mill, or any other part of it but the two pointing places as above stated. *W. Barnet* did no other act to gain a settlement in the parish of *Dodderhill*."

The renting by a needle maker of two out of six pointing places in another's mill, any two of which he was at liberty to use from time to time, at 16*l.* a-year rent, and engaging also to do all his landlord's work in preference to that of others, for which he was to be paid by the piece, is not the taking of a tenement within the statute so as to gain a settlement by it.

Parke was to have argued against the order of Sessions, and *Reader* and *Burton Morice* in support of it: but

The Court said there was no pretence for calling this agreement to work in the mill, the taking of a tenement; and that it was like the case of the *King v. The Inhabitants of Hammer-*

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Smith (a) a few years ago, which was disposed of on it's being first mentioned as too clear for argument.

Order of Sessions quashed.

(a) *The King* against *The Inhabitants of Hammermith*, Hil. 36 Geo. 3. B. R.

Two justices removed *Mary Rogers* widow of *J. Rogers* and three of their children from the hamlet of *Hammermith* in the parish of *Fulham* and county of *Middlesex* to the parish of *Chipping Wycombe*, in *Buckinghamshire*. The Sessions on Appeal quashed the order, and stated the following case for the opinion of this court. "*J. Rogers* the husband of the pauper was the son of *T. Rogers*. On the 25th of September 1790 *J.* and *T. Rogers* entered into articles of agreement under seal of that date with one *Richard Barton* the owner of a corn-mill in *Chipping Wycombe*, whereby *T.* and *J. Rogers* severally covenanted with *Barton* his executors &c. that they *Thomas* and *John* their executors &c. should and would with their horses and carriages at their own costs and charges from the said 25th of September 1790 to the 25th of March 1795 deliver at the corn-mill belonging to *Barton* weekly and every week three loads and an half of wheat at the least, and at their own costs and charges grind and make the same into flour; and should pay to *Barton* during the said term for the same after the rate of eight shillings for each load in manner and at the times therein stated during the continuance of the agreement. *Barton* covenanted that *Thomas* and *John* during the

continuance of the articles should have the use and liberty of running and grazing for their horses on a certain meadow therein described, and also the use and liberty of the stable and cart-house gratis for their horses and cart, and without paying for the meadow stable and cart-house. *Thomas* and *John R.* covenanted that they would weekly and every week during the continuance of the articles pay *Barton* the stipulated sum before mentioned on the respective days therein set forth. And *Barton* covenanted that he would at the expiration of the articles again take to all and singular the utensils belonging to the said corn-mill at a fair appraisement, and pay to *Thomas* and *John* such sum as the same should be appraised at. *J. Rogers* afterwards ground corn at the mill for two or three years; he never resided thereon during the same time, but in a cottage in the same parish which he rented at 3*l.* 18*s.* per annum."

Garraw was to have argued in support of the order of Sessions, and

Gibbs contra; but the latter abandoned the Case;

The Court being clearly of opinion that there was no colour for construing this agreement into the taking of a tenement.

Order of Sessions confirmed.

Friday
Jan. 31st.

MELLISH and Another against PETHERICK.

A defendant, who has given a bail bond, cannot be holden to bail in an action brought by the Sheriff on that bond.

THE defendant, having been arrested by the plaintiffs as Sheriffs of London, gave together with two other persons a bail bond to the Sheriff in that action; and on that bail bond the plaintiffs now held the defendant to bail. A rule having been obtained by

Conste, calling on the plaintiffs to shew cause why the defendant should not be discharged out of custody on filing common bail, on the authority of *Brander v. Robson*, Ante 6 vol. 336;

Marryatt now shewed cause against the rule; and attempted to distinguish this case from that cited, because here the original

defendant

defendant himself was arrested, whereas in that case it was only determined that the *bail* to the Sheriff could not be holden to bail. And he referred to *Prendergast v. Davis*, *Ante* 85. But

The Court were of opinion that the reason, on which the case of *Brander v. Robson* was decided, equally applied to the present case; and therefore they made the

Rule absolute.

1800.
MELLISH
against
PETHE-
RICK.

TAPLEY *against* MARTENS.

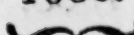
Friday
Jan. 31st.

THIS was an action of debt on a charter party between the plaintiff, the master of the brig *Hero*, and the defendant the freighter, for a voyage from *London* to *Ancona* and from thence to *Venice*. The plaintiff covenanted that he would receive and take on board a certain cargo of pilchards and proceed to *Ancona*, and there deliver the cargo agreeably to the bill of lading; in consideration whereof the defendant covenanted that he would load and ship on board the said pilchards &c, and pay or cause to be paid to the said master or his order freight at *Ancona* on a delivery of the cargo according to the bill of lading at the rate of $5\frac{1}{2}$ *Leghorn* dollars *per* hoghead. The breach assigned in the declaration, after averring a delivery of the cargo at *Ancona* agreeably to the bill of lading, was non-payment of 661*l.* 10*s.* 3*d.* for the freight &c. The defendant pleaded payment according to the terms of the charter party; and issue having been joined thereon, a verdict was taken for the plaintiff, subject to the opinion of this court on the following case.

On the 20th of *November* 1795 the plaintiff sailed with the *Hero*, having the cargo of pilchards on board, and proceeded direct to *Ancona*, and there delivered to one S. M. *Acquabona* the correspondent of the defendant at that place and the consignee of the pilchards, which were to be delivered there, five hundred hogheads of pilchards (being such part of the cargo as was destined to *Ancona*) according to the terms and conditions of the charter party. The freight of the five hundred hogheads of pilchards so delivered amounted to 661*l.* 10*s.* 3*d.* The plaintiff addressed himself to *Acquabona* as the correspondent of the defendant at *Ancona*, and *Acquabona* was directed by the defendant there (he, *Acquabona*, being then indebted to the defendant in more than the amount of it) to pay the freight. The plaintiff, whilst he was delivering the cargo to

Acquabona

A., wishing to send goods to *B.* at *X.* employed *C.* to carry and deliver them to *B.*, and engaged to pay *C.* for the freight; *C.* on delivering them according to the order took a bill of exchange from *B.* drawn on *A.*, which bill was never paid: held that *A.* was liable to pay the amount of the freight to *C.*, notwithstanding the bill of exchange.

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 TAPLEY
 against
 MARTENS.

Acquabona, applied to him to settle for the freight, as he (the plaintiff) wished to remit some money to his owners in *England*, and said he should want about 500*l.* of it for that purpose. Thereupon *Acquabona* sent to him by his broker a bill of exchange for 500*l.* drawn by *Acquabona* upon the defendant, and the plaintiff seeing that the bill was drawn upon the defendant was quite satisfied with it, and accordingly took and remitted it to *England*; but if it had been drawn upon any other person he would have made inquiry before he took the bill. The remainder of the sum due for freight at *Ancona* was afterwards paid at *Venice*. On the 13th of *April* 1796, after the delivery of the cargo which was destined to *Ancona*, the plaintiff and *Acquabona* settled an account current, in which the bill for 500*l.* was included. The bill so drawn on the defendant by *Acquabona* was duly presented for acceptance, but it was not accepted by the defendant and it remains unpaid. Before the bill became due *Acquabona* became insolvent, and then was and now is indebted to the defendant in more than 500*l.* The question for the opinion of the court is whether the plaintiff can recover from the defendant the 500*l.* for which the bill drawn by *Acquabona* was given.

Park for the plaintiff. The defendant failed in proving that which he undertook to prove, payment of the freight due on the charter party; the bill, by means of which he endeavoured to establish that proof, not having been paid. If the defendant himself had given this bill, which was afterwards dishonoured, it clearly would not have been considered as payment: then the circumstance of the bill having been given by *Acquabona*, who was the servant or agent of the defendant, cannot vary the question. The plaintiff could not know that *Acquabona* was indebted to the defendant at that time, and that he had no right to draw upon him. At all events, this cannot be considered as payment so as to support the issue; if the defendant had intended to avail himself of the bill as taken by the plaintiff in satisfaction of his debt, he should have pleaded it; according to *Kearlake v. Morgan*, ante 5 vol. 513.

Giles for the defendant. The facts stated in the case support the issue, which was that the defendant had paid the freight &c. according to the charter party. By the terms of the covenant the plaintiff was to be paid at *Ancona*; and therefore, if he had chosen, he might have insisted on payment in money before he delivered the cargo; and it was his own laches not to do so, for

which he, and not the defendant, ought to suffer. But instead of taking the freight in money from the consignee, as he should have done, (the defendant having directed his consignee at *Ancona* to pay the freight there, and having furnished him with funds for the purpose,) the plaintiff for his own accommodation applied to that consignee for a bill to remit to his owners in *England*. The plaintiff by this transaction gave personal credit to the consignee, which he should not have done, if he had wished to resort to the defendant afterwards. As the plaintiff chose to take the bill in question instead of money for his own accommodation, it is payment as between him and the defendant. This is most like the case where a master sends his servant to market to buy goods for him, and furnishes him with money for that purpose, when if the tradesman will part with the goods upon the credit of the servant, he does it at his own risk.

Lord KENYON Ch. J.—This is a very clear case. The plaintiff in this cause, who took the defendant's goods on freight, was to perform the duty that resulted from that situation; and he was to receive from the defendant a certain sum for the carriage of the goods; he carried them and delivered them to the defendant's correspondent at *Ancona* pursuant to the bill of lading; when at *Ancona* he, not knowing any thing of *Acquabona* though the defendant knew *Acquabona* for he sent goods to him on credit, applied to this consignee for payment, who gave him a bill of exchange that turned out to be of no value. If the fact had been, as supposed in argument by the defendant's counsel, that the consignee had been ready to pay in money, and the plaintiff had taken this bill for his own accommodation, there would have been some weight in the argument: but the fact was otherwise. The case states that the plaintiff applied to *Acquabona* "to settle for the freight:" but it does not from thence follow that he applied for payment by means of a bill of exchange; money would have been of more value than a bill either at *Ancona* or any other port in *Italy*. Or if the plaintiff had been guilty of any negligence after he had taken the bill in not endeavouring to enforce payment of it, that might have been an answer to the present demand. But this bill was drawn on the defendant himself, which might have deluded the most cautious man; it was a payment in the usual mode of payment in the commercial world; the plaintiff has been guilty of no neglect; and the question is whether this can be considered as payment of the plaintiff's debt? I think not. All that is required of an agent is that he shall use common prudence; here

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 ———
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the plaintiff did use common prudence; the defendant, by sending the goods to the consignee at *Ancona*, accredited him there. I am therefore clearly of opinion that this bill cannot be considered as payment of the plaintiff's demand, and that the defendant is now liable on the charter-party to pay the amount of it.

The rest of the Court were of the same opinion.

Per Curiam,

Postea to the Plaintiff.

Saturday.
Feb. 1st.

The KING *against* The INHABITANTS of WINWICK.

The assent of two magistrates to a parish indenture is sufficiently signified by one of them first signing it alone and being afterwards present when the other signs it.

UPON an appeal against an order of two justices for the removal of *John Gurney*, his wife and child, from the parish of *Winwick* to the parish of *Spratton*, both in *Northamptonshire*, the sessions quashed the order, subject to the opinion of this Court on the following case.

The pauper was settled by birth at *Winwick*. The counsel for the parish of *Winwick* offered in evidence an instrument purporting to be an indenture dated the 18th of *December* 1789, whereby the pauper was bound an apprentice by the parish officers of *Winwick* to one *Thomas Horn* of *Spratton* until he should attain the age of twenty-one years; and under which the pauper resided forty days with his master at *Spratton*. The instrument was signed by the Rev. Dr. *Freeman* and the Rev. Dr. *Preedy*, two of the justices for the county of *Northampton*; the same was signed by the Rev. Dr. *Freeman* at the parish of *Long Buckley* where he resides, and the Rev. Dr. *Preedy* was not then present; but a few days afterwards the Rev. Dr. *Freeman* went to the house of Dr. *Preedy* where the same was signed by the Rev. Dr. *Preedy* in the presence of all the parties. Under these circumstances the sessions were of opinion that the indenture was void.

Garrow, *Dayrell*, and *Beauclerk*, in support of the order of sessions, relied on the case of *The King v. Hampstall Ridware* (a), to shew that no settlement could be gained by service under a parish indenture of apprenticeship, to which the two magistrates, whose assent to such binding is required by the 43 *Eliz. c. 2. s. 1.*, had separately given their assent by their signatures at several times; because, as was there determined, the assent of the magistrates is a judicial and not a ministerial act; and they are bound to exercise their judgment and discretion jointly for the benefit of the infant who is to be bound apprentice without the consent of the

(a) *Ante*, 3 vol. 380.

parents.

parents. And they urged that the signatures of the magistrates made at different times in this case was not such a joint assent as is required by the act of parliament, according to the construction which had been always put upon it.

Conste, Burton Morrice, and Perkins, contra were stopped by the Court.

LORD KENYON Ch. J. This case is clearly distinguishable from that of *R. v. Hampshall Ridware*, because, though one of the magistrates first put his signature to this indenture at a time when the other was not present, both the magistrates afterwards met on the subject and agreed to the propriety of the measure when the other magistrate also executed the instrument. The principle on which this case is determined was recognized some years ago in a case of murder: a magistrate, who kept by him a number of blank warrants ready signed, on being applied to, filled up one of these and signed and delivered it to the officer, who on endeavouring to arrest the party was killed; the judges were of opinion that this was murder in the person killing the officer, and he was accordingly executed. And this was not a new principle then for the first time established; it had been always uniformly acted upon.

But as the merits of this case had not been gone into at the sessions, this case was sent down to be restated.

MARTIN *against* RANOE.

THE defendant was arrested on an affidavit of the debt made by the plaintiff, the assignee of *Dunne* a bankrupt, in which it was sworn that the defendant was justly and truly indebted in 80 *l.* to the plaintiff, as assignee &c. for goods sold &c. by *Dunne* before he became a bankrupt, as appeared by an account in the hand-writing of *Dunne*, and which sum the plaintiff believed to be due from the defendant to the estate of *Dunne*; and that *no offer had been made to the plaintiff*, as assignee, of the said sum of 80 *l.* in notes of the Bank of England (a).

It was objected, on a rule to deliver up the bail-bond to be cancelled and to accept common bail, that it should have been alleged in the affidavit that (as far as the plaintiff believed) *no offer* had been made by the defendant *to pay the bankrupt* in Bank notes before his bankruptcy.

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The KING
against
The INHABITANTS OF
WINWICK.

Saturday.
Feb. 11.

In an affidavit to hold to bail made by the assignee of a bankrupt, it is necessary to negative a tender of the debt in Bank notes to the bankrupt before his bankruptcy: saying that no such tender was made to the assignee is not sufficient.

(a) *Vid. stat. 38 G. 3. c. 1. s. 8.*

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MARTIN
against
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The Court thought that this objection was well founded; and that the want of such an averment in the affidavit was not aided by the general allegation that "the defendant is justly and truly indebted &c." Therefore they made the

Rule absolute.

Lawes in support of the rule.*Park* against it.Monday.
February 3d.

HYDE against WHISKARD.

Bail above
may be put
in before the
return of the
writ; and
consequently
the plaintiff
cannot after-
wards pro-
ceed on the
bail-bond.

THE writ in this case was returnable on the 6th of *November* last; on the 4th of *November* bail above was put in for the purpose of surrendering the defendant to the *King's Bench* prison; on the same day the defendant was surrendered in discharge of his bail, and he was committed to the custody of the marshal; on the 12th of *November* notice was given to the plaintiff of the bail and of the defendant's surrender; on the 25th of *November* the plaintiff took an assignment of the bail-bond, and on the next day he commenced actions against the bail and also against the defendant on the bail-bond. Whereupon

A rule was obtained, calling on the plaintiff to shew cause why the proceedings on the bail-bond should not be set aside for irregularity, because the plaintiff had proceeded on the bail-bond after bail above had been put in; the defendant insisting that he might surrender at any time so that the sheriff had his body at the return of the writ. *Stamper v. Milburne*; ante 7 vol. 122.

In answer to this application it was said that bail was not regularly put in, for that bail could not be put in nor could the defendant be surrendered before the return of the writ. *Newton v. Lewis. Barnes* 88. Whereas here the defendant had attempted to put in bail and to surrender himself in discharge of his bail two days before the return of the writ.

The Court, on the authority of the case in *Barnes*, were at first of opinion that this was an answer to the application. But on the next day

LAWRENCE J. doubting of this opinion on account of what is said in the cases of *Huggins v. Bambridge* (a), *Shuttle v. Wood* (b), and *Kindley v. Cunningham* (c), the case was again argued on a subsequent day in the term, when

(a) *Barnes* 83.(b) *Salk.* 564.(c) 1 *Crom. Prac.* 59.

The Court all expressed their opinion that bail above was properly put in, though before the return of the writ, and consequently that the subsequent proceedings on the bail-bond were irregular. And they made the

Rule absolute (d).

Mingay and Jervis in support of the rule.

Holroyd against it.

1800.

HYDE
against
WHISKARD.

(d) The following account of the cases of *Huggins v. Bambridge*, and *Newton v. Lewis*, taken from the MSS. of Lord Ch. J. Willes, is more full than that given in *Barnes* 83 and 88.

"*Huggins v. Bambridge*. Bootle Serjt. shewed cause against a rule for an attachment against the plaintiff, *John Dewell*, and *Jonathan Gurney*. The charge against them was an oppressive proceeding against the defendant and an abuse of the process of the court. The fact upon the affidavits appeared to be thus: The plaintiff had taken out a *capias* against the defendant, teste'd on the last day of *Trinity Term* 1738, returnable the first return of *Michaelmas Term*, and taken out on the 19th of *August*. The defendant put in bail before a judge on the 23d of *August* 1738 before any arrest of which the plaintiff and *Dewell* had notice. The plaintiff afterwards caused the defendant to be arrested by the two other persons by virtue of a warrant dated the 29th of *September*, founded on the said *capias*; *Dewell* was mentioned in the warrant and *Gurney* was his assistant. The defendant was detained on this warrant until the 20th of *October*, and then he removed himself by *Habeas Corpus* to the *Fleet* where he lay several weeks. The great doubt was whether a defendant could put in bail before the return of the writ and before he was arrested.

"My Brother *Fortescue Aland* was clear that he might, and said that it had been so determined over and over again both in this court and in *B. R.*; and when this motion was formerly made, my Brother *Denton* and the Prothonotaries seemed to be of that opinion.

"But I was of another opinion, and for this plain reason; because if the defendant can put in bail before he is arrested and cannot be arrested afterwards, there will be no bail-bond taken; and then if the bail do not justify at the beginning of the term, the return of the writ being out, the plaintiff will lose the benefit of it, and by this

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mean it will be in the power of any defendant if a writ be sued out in the vacation returnable the first return of the next term to deprive the plaintiff of the benefit of his writ; and for this reason my Brother *Fortescue Wm.* and my Brother *Parker** were of the same opinion with me; and the prothonotaries said that they could not answer this objection, and therefore had altered their opinion. But it appearing that the defendant had suffered greatly, the court enlarged the rule to give the parties time to accommodate the matter if they could, the plaintiff having offered the defendant a very considerable sum to make it up."

— "*John de Champes v. S. Lewis*. A rule nisi had been made before on the motion of Serjt. *Wynne* for a superseas to discharge the defendant out of custody, because his bail had surrendered him before the return of the writ. The case was this; The writ was teste'd on the last day of last *Trinity Term*, returnable the first return of this term. The defendant had been arrested and bail-bond given; bail was put in before M. J. *Fortescue Aland* after *Trinity term*, and the bail surrendered the defendant before him in the long vacation, in *July*, and he has been in custody ever since: the bail were the same persons who had given the bail-bond to the sheriff. The single question was whether a defendant could put in bail before the return of the writ, so as to prevent the defendant's being arrested if put in before the arrest, or to render his body if arrested. And *Prime Serjt.* for the defendant insisted that after an arrest a defendant may put in bail before the return of the writ, and that that is the constant practice; and that if he may put in bail, his bail may surrender him. And for this purpose he cited *Hargrave v. Rogers*, *Cro. Jac.* 97; but that is nothing to the present case, which is a cause brought originally in

* Mr. B. *Parker* succeeded Mr. J. *Denton* in this court after the rule nisi was obtained.

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HYDE
against
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this court. He also cited the case of *Hawley v. Ludlow*, *Comb.* 4, 5; where in an action on a bail-bond the bail pleaded that the principal had rendered himself in discharge of his bail before the day of appearance; and it is there reported as said by the Lord Ch. Justice that such surrender discharges the bail "for the body being rendered the arrest hath it's effect." But *Holt* in his argument as counsel said that a surrender before the day cannot discharge the bail, and that the condition of this bond differs from the condition of a recognizance of bail; and to be sure he was in the right, and the Ch. Justice was mistaken. He relied also much on the case of *Huggins v. Bambridge*, which came on upon a rule nisi against *Huggins* to shew cause why an attachment should not go against him, *E.* 13. *G.* 2., where (as he said) it was holden by the court that though a man could not put in bail before an arrest without consent yet he may after an arrest before the return of the writ. But we were not of that opinion: But my Brother *Denton* was at the time when the rule was moved for, and my Brother *Fortescue Aland* persevered in it to the last; nay, they were of opinion that bail might be put in before the arrest; and my Brother *Fortescue* said that it had been so determined over and over again both in *B. R.* and in this court: but when he came to produce his cases, he could not produce any but where it was done by consent. The case of *Huggins v. Bambridge* was exactly the same as this, only in that *Bambridge* had put in bail before the arrest, and *Huggins* arrested him afterwards, which was the foundation of the motion for an attachment against *Huggins*: and I and my Brothers *Fortescue Wm.* and *Parker* discharged that rule; because if the defendant can put in bail before he is arrested and cannot be arrested afterwards, there will be no bail-bond taken, and then if the bail be not justified the beginning of the term, the return of the writ being out, the plaintiff will lose the benefit of his process; and all the prothonotaries agreed that they could not answer this objection.

"And in the present case *We were of opinion* that the defendant could not put in bail and the bail render him before the return of the writ, because by this mean the sheriff might be greatly prejudiced; for to whom must the render be; it cannot be to the sheriff, because he has taken a bail-bond for his appearance; it cannot be to the Court,

because the Court has nothing to do with him until after the return of the writ. Either therefore the render must be considered as void, as if the party be considered in the custody of the sheriff if he has him not ready at the day in court he will be guilty of an escape, or if he return non est inventus he will be liable to an action for a false return. We cannot therefore do justice but by setting aside the render and discharging the defendant: but as this seemed to be a contrivance between the plaintiff and defendant to saddle the bail, or between the defendant and the bail to trick the plaintiff, there being the same bail-bond, that injustice might not be done to any one, We ordered the defendant to be brought into court another day, and then discharged him; and the bail, who were likewise ordered to be present in court, were then permitted to surrender him again in their discharge, and the bail was entered as put in at the return of the writ as it ought to be, and so all appeared to be right on record. For it was admitted that bail may be put in de bene esse before the return of the writ, but it is always entered as of the return day and so it is of no efficacy until that time.

— "N. Mr. J. *Fortescue A.* was absent when we delivered this opinion—

—"It is plain that in *Comberbach* and other books, where something has been said in relation to this matter, the Court did not consider the distinction between a bail-bond and bail; the first being only to enforce an appearance for the security of the sheriff, the latter an actual custody delivered to the bail by the Court."

—The following note is in the same MSS. of a subsequent date. "*De Champes v. Lewis*, and *Newton v. Lewis*—*Lewis* was brought up by *habeas corpus* according to our former order, and *Newton* an attorney of this court and the plaintiff in one of the causes appeared. The *habeas corpus* and return being read, We ordered the sheriff to return the writs in both causes; and accordingly he soon after returned *cepi corpus* in both causes. Then we ordered the render to be discharged, and the bail appearing to be entered regularly as of the return day, We permitted the bail (being then present in court, and who were the same persons who had given the bail-bond to the sheriff,) to surrender *Lewis* in court in their own discharge; and then we ordered the surrender to be entered as of this day, and remanded *Lewis* back to the prison of the *Fleet*."

BARTON Clerk and Another *against* WEBB and Another
Executors of WM. JACQUES.

Tuesday,
Feb. 4th.

DEBT on bond. The defendants craved oyer of the bond, whereby *B. Rookby* and *Wm. Jacques* (the testator) became jointly and severally bound in the penal sum of 100*l.* to the plaintiffs as joint treasurers of the charity-school of the parish of *Saint Andrew, Holborn, London*; and also craved oyer of the condition, which, after reciting that *B. Rookby* had been appointed collector of the voluntary subscriptions which should be contributed by any person or persons for the use and benefit of the charity-school upon condition that he should enter into a bond with a sufficient surety to the said treasurers, and from time to time to account for and pay over the same to them, was that if *Rookby* should from time to time well and truly within the times by the said treasurers appointed account for and pay to them or one of them all such money as at any time should be received by or come to the hands power or use of him the said *Rookby* or any person in trust for him by the produce or means of any voluntary contribution or subscription paid to the said *Rookby* for the use and benefit of the said charity-school, and also should in all respects during his the said *Rookby*'s continuance in the said office of collector perform the same faithfully &c. then the said obligation should be void. The defendants then pleaded performance generally according to the terms of the condition.

The plaintiffs replied that after the making of the said writing obligatory and during *Rookby*'s continuance in the said office of collector he had and received a certain sum of money, to wit, one pound and one shilling of and from one *S. Gosnell* as and for a voluntary contribution or subscription paid by *Gosnell* to him *Rookby* for the use and benefit of the said charity-school, yet that *Rookby* had not well and truly accounted for and paid the same to the plaintiffs or either of them, but had wholly failed and made default, and the said sum so received by the said *Rookby* was still wholly unpaid to the plaintiffs or either of them, contrary to the form and effect of the said condition &c. For further breach, according to the form of the statute &c., the plaintiffs said that after the making of the said writing obligatory and during *Rookby*'s continuance in the said office of collector &c. to wit on the 1st of *December* 1795 and on divers other days and times between that day and the day

To debt on bond, conditioned that one *B. R.* should account for and pay over to the plaintiffs as treasurers of a charity such voluntary contributions as he should collect for the use of the charity, the defendants pleaded general performance: the plaintiffs replied that *B. R.* had received divers sums amounting to a large sum, viz. 100*l.* from divers persons for divers voluntary contributions for the use of the said charity, which he had not accounted for or paid over &c: held on special demurrer that the replication was sufficiently certain.

1800.

BARTON
against
WEBB.

of exhibiting the plaintiffs' bill &c. *Rooksby* had and received *divers large sums of money* amounting in the whole to a large sum of money, to wit, the sum of 100*l.* of and from *divers persons* as and for *divers* voluntary contributions or subscriptions made and paid by the said last mentioned persons respectively unto him *Rooksby* for the use and benefit of the said charity-school &c, yet that *Rooksby* (though requested) had not well and truly accounted for and paid the same or any part thereof to the plaintiffs or either of them, but had made default &c. And for further breach &c. the plaintiffs said that after the making of the said writing obligatory &c. to wit on &c. he *Rooksby* gave and rendered to the plaintiffs a certain account in writing of *divers* voluntary contributions and subscriptions received by and come to the hands of him *Rooksby* for the use and benefit of the said charity-school &c, and that in and by the said account so given and rendered by the said *Rooksby* to the plaintiffs there appeared to have been received and come to the hands of him *Rooksby* by the produce of *divers* voluntary contributions or subscriptions made unto him *Rooksby* for the use and benefit of the said charity-school &c. *divers large sums of money*, amounting in the whole to a large sum of money, to wit 100*l.*; at &c.; and the plaintiffs said that the said several sums of money so as aforesaid amounting to a large sum, to wit, 100*l.*, had so been received by and had so come to the hands of the said *Rooksby* by the produce of the last mentioned voluntary contributions or subscriptions made for the use and benefit of the said charity-school, and that at the time of the giving and rendering of the said last mentioned account in writing the said last mentioned sum of 100*l.* was wholly unpaid to the plaintiffs or either of them &c; wherefore &c.

The defendants in their rejoinder took issue on *Rooksby* having accounted for and paid any sum of money received by him from *Gosnell* as a contribution &c; and demurred to the second and third breaches assigned, stating for special cause of demurrer to the second, that the plaintiffs had not named described or in anywise ascertained the persons of or from whom *Rooksby* was supposed to have had and received the said sums of money in the said breach mentioned, so as to enable the defendants to meet the said charge, and for that the said breach was too vague and general &c.; and stating for special cause of demurrer to the third breach, that it contained only a statement of evidence and not of material facts, and did not with sufficient certainty name describe or ascertain of or from whom the sums of money therein supposed to have been

received by *Rooksby* were received, and for that the said breach was too vague and general &c. There was a joinder in demurrer as to the second and third breaches.

Wood in support of the demurrer. The two last breaches are assigned too generally; for the defendants, who are strangers to the transaction, have no means of knowing from so vague a charge what they are called upon to answer. The names at least of those persons from whom *Rooksby* received contributions ought to have been stated. Admitting that such a general mode of pleading would have been good as against the principal himself who was cognizant of the whole transaction, it does not follow that it is sufficient as against the surety or his executors who cannot be presumed to know what the principal received. In *I'Anson v. Stewart* (a) it was holden to be necessary to state in a justification to an action for a libel, in calling the plaintiff a *swindler*, the particular instances of fraud by which the defendant intended to support the charge, and to specify the names of the persons defrauded. So in the case of *Newman v. Bailey* (b) there cited; where a Justice of Peace brought an action against the defendant for charging him with "pocketing all the fines and penalties forfeited by delinquents whom he convicted" &c, to which the defendant pleaded generally that the plaintiff was a Justice of Peace and during the time of his acting as such he convicted *divers persons* respectively in *divers sums* &c. which sums he had received and had not paid over &c; the justification was holden bad on demurrer, because it did not specify any one fine or penalty, &c. Again in *Rex v. Robe* (c), on an information against a Clerk of a Market for exactions in his office, stating that under colour of his office he illegally caused his agents to demand and receive of *several other persons* *several other sums* on pretence of examining their weights and measures, judgment was arrested on account of the generality of the charge. There is a further objection to the third breach assigned, that it attempts to make a paper given in by *Rooksby* conclusive evidence against the defendants of his having received certain voluntary contributions on account of the charity. This is in effect a statement of evidence of a fact instead of an averment of the fact itself. And it is an attempt to make the acknowledgment of the principal conclusive evidence against the surety. But at any rate if such a matter can be pleaded at all, the account itself should

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(a) *Ante*, 1 vol. 748.(b) *Ib.* 750. *Hil.* 16 *Geo.* 3.(c) 2 *Stra.* 999.

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have been set out in hæc verba; which would have rendered the charge more certain.

Routh contra. There can be no difference between the case of a principal and that of a surety with regard to the form of pleading; greater certainty is not required in the one case than in the other. This mode of pleading is given by the statute 8 & 9 W. 3. c. 11. §. 8. Before that statute (a) a plaintiff could only assign one breach on the bond in answer to the plea of general performance; on proof of such breach he was entitled to judgment for the whole penalty at law; and the defendant was obliged to have recourse to a court of equity for relief, who would sometimes direct an issue to try to what extent the plaintiff had been damaged. That statute was intended as a remedial law in favour of both parties (b), and it substituted the present compendious method of proceeding by which justice may be obtained without the circuit and expence of a suit in chancery. But the legislature could never have intended to make plaintiffs assign breaches with more particularity than they were bound to do before; for then the whole benefit of the statute would be done away, and it would be necessary in most cases to file a bill in equity for a discovery before a plaintiff could assign his breaches with sufficient certainty. It is a general rule in pleading (c) that where a matter tends to great prolixity a concise manner of pleading may be admitted. Now if these breaches be not assigned with sufficient certainty, no other line can be drawn except that of stating at length every article of the account, mentioning every particular sum received, the time when, and also the person from whom it was received; for there can be no ground for requiring greater certainty in one of these respects than in the others. But the same rule applies here as in covenant, that when matter lies generally within the knowledge of the covenantor, there a general allegation is sufficient (d). And the surety standing in the same situation as the principal in respect to the plaintiffs, the rule will equally apply to this case.—He also referred to the following cases, where replications equally general as the present were either holden to be good, or in which no objection was taken to the generality of the pleading. *Lord Arlington v. Merrick*, 2 Saund. 411; *Duke of Bolton v. Clarke*, 1 Lutw. 580; *Lill. Entr.* 114; *Simmons v. Langborne*, 2 Wilf. 11; *Wright v. Russell*, 3 Wilf. 535; *Cornwallis v. Savery*, 2 Burr. 772; *The*

(a) *Collins v. Collins*, 2 Burr. 824.(b) *Hardy v. Bern*, ante, 5 vol. 540. 636.

(c) 1 Lutw. 421.

(d) 9 Co. 61. Gro. Jac. 304.

Irish Society v. Needham, ante, 1 vol. 482; and *Shum and others v. Farrington*, Hil. 37 Geo. 3. C. B.; which last case was shortly this. To debt on bond for 2000*l.* the defendant craved oyer of the bond and condition, from whence it appeared that the defendant and one *R. Spratling* became jointly and severally bound to the plaintiffs as brewers and copartners, conditioned for the good behaviour of *R. S.* employed by the plaintiffs as their agent or factor in their business as brewers, and for his duly rendering and paying to the plaintiffs a true and just account payment and delivery of all monies &c. belonging to their trade with which he should be entrusted or which he should receive &c. as agent for the plaintiffs: The defendant then averred performance: The plaintiffs replied that *R. S.* whilst he so continued to manage the business of the plaintiffs as their agent or factor, viz. on the 30th of October 1793 and on divers other days and times between that day and the 1st of July 1796 under and by virtue of the said appointment received divers sums of money, amounting to a large sum, viz. 2000*l.*, belonging to such business as such agent &c., and had not given rendered and paid to the plaintiffs a true and just account payment and delivery of the said sum of 2000*l.* &c. To this there was a demurrer, assigning for special cause, that it did not appear in and by the replication from whom or in what manner or in what proportions &c. the said sums were received. But the court held it sufficient, and overruled the case of *Jones v. Williams* (a) which was cited in support of the demurrer.—In support of the third breach assigned he cited *Bache and others v. Proctor* (b) as in point. And, added that no inconvenience could ensue to a defendant in such cases, because if he were really ignorant of the circumstances he might take out a summons to compel the plaintiff to produce the particulars of his demand.

Wood in reply. No less certainty is required under the statute of *William* than was necessary at common law; the intent being the same, to apprise the adverse party of what he is charged with. This rule applies as well where the breach is assigned in the replication as in the declaration; and the cases first cited shew that this manner of pleading in a declaration is ill. Though it may not be necessary, for the sake of avoiding prolixity, that the particular sum received from each person or the time when should be set forth, yet it was necessary, in order to give the defendants due notice of the circumstances, that the names of the persons from whom

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any of the money was received should be mentioned, without which they cannot be prepared with evidence to defend themselves. In this respect the case of a surety differs essentially from that of the principal, who must be presumed to know his own acts. And this case is distinguishable from that of *Shum v. Farrington*; for there the breach assigned was that the defendant had not rendered an account, which is one single act.

The Court (a) expressed a clear opinion against the defendant, considering the case of a surety or his executors to stand exactly in the same situation as that of the principal himself. And they assented to the case of *Shum and others v. Farrington* in opposition to that of *Jones v. Williams*, which latter (they observed) was never generally approved in *Westminster Hall*. Whereupon

Wood desired leave to withdraw his demurrer and plead to issue, which was granted.

(a) Absent *Ld. Kenyon Ch. J.*

Tuesday,
Feb. 4th.

The KING *against* The Sheriff of MIDDLESEX, in a Cause of BROWN *v.* CULVER.

When the rule to bring in the body expires on the last day of a term, the bail have the whole of the first day of the next term to justify; and if the defendant surrenders in discharge of his bail on any part of that day, the sheriff cannot be attached for not bringing in the body.

THE writ in this case was returnable on the 23d of *November* last; bail was put in on the 27th; and the rule to bring in the body expired on the last day of the last term, so that the bail had the whole of the first day of this term to justify. On the first day of this term the defendant (*Culver*) surrendered in discharge of his bail, but no notice of it was given until eight in the evening: on the same day an attachment issued against the sheriff.

And the only question was whether or not a render of the defendant on any part of the first day of this term were sufficient to prevent an attachment issuing against the sheriff on that day;

The Court, after conferring with the Master, were of opinion that, as the bail had the whole of that day in which to justify, a surrender of the defendant on any part of that day justified the sheriff; and therefore they made the rule absolute to set aside the attachment, as having issued too soon.

Rule absolute.

Wigley in support of the rule.

Marryat against it.

The KING *against* The Inhabitants of ULLESTHORPE.Wednesday,
February 5th.

TWO justices removed *T. Smith, E.* his wife and their two children, from *Ullesthorpe* to *Earl Philton*; the court of Quarter Sessions quashed the order, and stated the following case for the opinion of this court.

A certificate granted by the parish of *A.* to *B.*, acknowledging *C.* and *D.* his wife and their children to be their parishioners, is conclusive as between the parishes of *A.* and *B.*; though *D.* were not the legal wife of *C.*

Mary Foxon, the mother of the pauper *T. Smith*, whose maiden name was *Taylor*, was married about forty years ago to one *David Roberts* whose settlement was at the parish of *Huncote*, and who enlisted for a soldier a short time after, and was never after seen by the said *Mary Foxon* his then wife. She hearing that he was dead about seven years after married *John Smith*, the father of the pauper *T. Smith*; and about two months after such marriage they applied to the parish of *Earl Philton* for a certificate, who granted one to *Ullesthorpe*, acknowledging the said *John Smith, Mary his wife*, and their family, to be their inhabitants legally settled in that parish. It was proved that the original husband of *M. Foxon* (*D. Roberts*) was alive and came home after the said *M. Foxon's* marriage with *J. Smith*. *T. Smith* the pauper was born during the cohabitation of the said *Mary* and *J. Smith*, and after the said certificate, in the parish of *Ullesthorpe*.

Beauclerk having on a former day obtained a rule nisi to quash the order of sessions, that rule was now made absolute without opposition.

Per Curiam,

Order of sessions quashed (a).

(a) Vid. *R. v. Toftock. Burr. S. C. 737*; *R. v. Headcorn. Ib. 253*.PALK *against* RENDLE.Wednesday,
February 5th.

THE writ was sued out in last *Trinity* vacation, returnable the first return-day of *Michaelmas* Term. In *Michaelmas* vacation common bail was filed by the plaintiff for the defendant according to the statute 12 *Geo. 1. c. 29.*; and the declaration was filed with notice to plead within the first four days of *Hilary* Term. On the 23d of *January* a rule to plead was given, which

If defendant suffer plaintiff to file common bail for him under the statute, the latter may upon the expiration of the rule to

plead sign judgment for want of a plea without any demand of a plea (a).

(a) *Aliter*, where the defendant enters declaration out of the office. *White v. Dent*; *C. B. Esq. and Pull. 341*.

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of course expired on the 27th, and the plaintiff was entitled to sign judgment on the 28th, which however he did not do until the 29th. But previous to the judgment being signed though after the time the plaintiff was entitled to sign it the defendant's attorney left notice at the chambers of the plaintiff's attorney that he had taken the declaration out of the office, and desired the plaintiff's attorney to demand a plea of him; which notice the plaintiff's attorney did not see until after the judgment was signed. Upon a rule nisi for setting aside the judgment for irregularity, supported by *Dampier*, and opposed by *Gafelce*,

The Court, after consulting the master, were of opinion that the defendant, not having filed bail for himself, was not entitled to a demand of a plea, and that the judgment was regular.

Rule discharged.

Thursday,
February 6th.

GRIFFITHS *against* DAVIES.

Trespass, one count; several pleas of justification on which issues taken; new assignment, as to which judgment by default; venire as well to assess the damages on the judgment by default as to try the issues; all the issues found for the defendant: held that the defendant was entitled to the costs of those issues.

THIS was an action of trespass, in one count only, for breaking and entering the plaintiff's close called *Cookan* in the parish of *Stoke Lacey* in the county of *Hereford*. There was no plea of the general issue: but the defendant pleaded three several pleas of justification, claiming in each of them a prescriptive right of way over the close, called *The Cookan*; each of which prescriptions was traversed in the replication, and issues were taken thereon. The plaintiff also new assigned, and stated that he brought his action as well for the trespasses mentioned in the pleas as for other trespasses committed in the same close at other times and on other occasions &c. and out of the said supposed ways &c; as to which the defendant suffered judgment to go by default. The venire was to inquire what damages the plaintiff had sustained by reason of the latter trespasses and also to try the several issues joined. The jury found a verdict for the defendant on the issues on those three pleas, and assessed the damages on the judgment by default at 1 s.

Manley having obtained a rule calling on the plaintiff to shew cause why the Master should not be directed to tax the defendant his costs upon the issues found for him, on the authority of *Day v. Hanks*, ante, 3 vol. 654;

Abbott now shewed cause against that rule; and attempted to distinguish this case from that, by observing that there were two

counts in the declaration in that case, on one of which the defendant had judgment: whereas here there was only one count. But

The Court said that that made no difference; and that the present case could not be distinguished on principle from that of *Day v. Hanks*. And

LE BLANC J. said that the authority of that case had been recognized in a subsequent case in the court of *Common Pleas*, *Tr. 32 G. 3.*, where the declaration consisted of only one count, and where the decision was the same. That was an action of covenant; as to part the defendant admitted that he had broken the covenant, and he pleaded as to the residue; the venire was awarded as well to try the issue joined as to assess damages on that part on which the defendant had suffered judgment by default; on the trial of the issue the defendant obtained a verdict; and on an application to the court of *Common Pleas* they were of opinion that the defendant was entitled to the costs on the issue found for him.

Per Curiam,

Rule absolute.

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The KING *against* AUTRIDGE.

Thursday,
February 6th.

THE defendant, to an information in nature of quo warranto calling on him to shew by what authority he exercised the office of a free burgess of *Launceston*, having (under the common rule to plead several matters) pleaded two prescriptive titles in two separate pleas,

Gaselee now moved to strike out one of the pleas; contending that the statute 32 G. 3. c. 58. (a), which for the first time enabled a defendant in certain cases to plead several pleas to an information in nature of quo warranto, only extended to cases where the defendant pleaded that he had holden the office for six years, when and when only he may plead other pleas. That the object of the

A defendant in an information in nature of quo warranto may plead several pleas under stat. 32 G. 3. c. 58. even though he do not plead (in one of them) that statute of limitations.

(a) By that statute, after reciting "that it would greatly tend to secure the freedom of elections and the quiet tranquillity and good order of cities boroughs and towns corporate if a certain reasonable limitation of time should be by law established, beyond which no member or officer of any city borough or town corporate should be disturbed in the enjoyment or exercise of his office or franchise which he should have held and enjoyed for such time," it is enacted that "it shall be lawful for the defendant to any information in the nature of

a quo warranto for the exercise of any office or franchise in any city borough or town corporate to plead that he had first actually taken upon himself or held or executed the office or franchise which is the subject of such information six years or more before the exhibiting of such information &c; which plea shall and may be pleaded either singly or together with and besides such plea as he might have lawfully pleaded before the passing of the act, or such several pleas as the court on motion shall allow."

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legislature, in passing that act, was to give a benefit to persons who had been in office for six years, it reciting that "it would greatly tend to secure the quiet &c. of towns corporate &c. if a certain reasonable limitation of time should be by law allowed beyond which no officer should be disturbed in the enjoyment or exercise of his office;" and the enacting part confining the privilege of pleading several pleas to cases where the defendant pleaded the statute of limitations; for after allowing him to plead this plea, it adds "which plea shall and may be pleaded either singly or together with and besides such plea as he might have pleaded before." But .

Lord KENYON Ch. J. said that the statute ought not to receive so narrow a construction; for that the legislature intended to give a defendant, in such a proceeding, the liberty of pleading several pleas, whether with or without the plea of the statute of limitations; the concluding words in the act being "or such several pleas as the court on motion shall allow."

Per Curiam,

Rule refused.

Friday,
February 7th.

PERCHARD *against* HEYWOOD,

The act of the
7 Geo. 3. c. 37.
exempting
the owners
of certain
lands em-
banked from
the river
Thames from
all taxes and
assessments
whatsoever,
does not ex-
empt the oc-
cupiers of
houses built
on such
lands from
the pay-
ment of the
house and
window du-
ties, imposed
by statute
38 Geo. 3.
c. 40.

TO trespass for breaking and entering the plaintiff's dwelling-house, and taking and carrying away his goods, the defendant pleaded the general issue. At the trial before Lord *Kenyon* at the sittings at *Guildhall* after last *Michaelmas* term a verdict was taken for the plaintiff for 71 *l.* 8 *s.*; subject to the opinion of this court on the following case.

The plaintiff's dwelling-house stands on the ground which was formerly part of the ground and soil of the river *Thames* inclosed and embanked in pursuance of and subject to the quit-rent imposed thereon by the act of the 7 Geo. 3. c. 37. entitled "An act for completing the bridge across the river *Thames* &c.," and was erected on the said ground after the making of the embankment. The plaintiff was not for some years before nor until after the passing of the act of the 38 Geo. 3. c. 40. charged or assessed in respect to his dwelling-house with or to any rate or tax on houses or windows; nor is he now charged otherwise than as hereafter is mentioned. The entry seizure and conversion, for which this action is brought, were made by the defendant under assessments regularly made, and under a warrant to him in that respect regularly granted by the commissioners duly authorized to act under

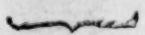
the following acts of parliament or some or one of them, *viz.* 38 *Geo.* 3. *c.* 40; 38 *Geo.* 3. *c.* 16; 38 *Geo.* 3. *c.* 81; by which warrant the defendant was required and directed by the commissioners to distrain the goods and chattels of the plaintiff for the non-payment of the following assessments or surcharges, *viz.*; for the dwelling-house according to the number of windows, 11 *l.* 12 *s.*; for the dwelling-house according to the value, 6 *l.* 5 *s.*; for the second, third, fourth, fifth, and sixth, instalments of the aid and contribution tax on the assessed taxes, 44 *l.* 12 *s.* 6 *d.*; and for the seventh instalment on the same, 8 *l.* 18 *s.* 6 *d.* The question for the opinion of the court was whether the plaintiff were exempt by the said act of the 7 *Geo.* 3. *c.* 37. from the assessments for which the distress was made or any or either of them.

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The act in question, which was passed for the purpose of completing *Blackfriars-bridge*, after reciting that it would tend to remove inconveniences if the soil of the river *Thames* between certain limits (including the premises in question) were embanked, the expence of which was estimated at a large sum, enabled the corporation of *London*, upon their petition, to embank the same; with a proviso that the owners of the ground abutting on the north side of the river might inclose and embank the same at their own expence; "And it was thereby further enacted that the ground and soil of the said river so to be inclosed and embanked &c. should vest and the same were thereby vested in the owners or proprietors of such adjoining ground, according to their respective estates, *free from all taxes and assessments whatsoever*"

East for the plaintiff contended that under these last-mentioned words the plaintiff was exempted from the payment of the house and window taxes; and if so, from the aid and contribution tax also, the rate of which was to be ascertained by the quantum of duty payable by the plaintiff for his house and windows, according to the principles on which this court had before decided the cases of *Williams v. Pritchard* (a), and *Eddington v. Borman* (b). The words of the exemption in the 7 *Geo.* 3. *c.* 37. are extensive enough to include every species of taxation: but admitting that they ought to be restrained within the apparent intent of the legislature, which was to encourage the owners of the soil to embank it from the river, (for which they paid and still continue to pay a valuable consideration), the words must be restrained to mean an exemption from "all taxes payable by the owners &c in respect of that

(a) *Ante*, 4 vol. 2.(b) *Ib.* 4.

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species of property." Now the 38 Geo. 3. c. 40., which imposes the new house and window duties in lieu of those which existed before the exemption contended for was created, expressly lays the duties "upon houses windows and lights, and upon inhabited houses," according to the schedules A and B at the end of the act. And though the third section of the act and schedule B direct the duties to be charged on the occupier, yet the former in terms imposes such charge on the occupier *in respect of the house* &c. Then if the owner be exempt from all taxes and assessments whatsoever in respect of this property, such exemption necessarily extends to his tenant in the same respect. The case of *Williams v. Pritchard* was the case of a tenant and not of the owner; and there the court held that he was exempt in respect of this very property from the payment of the land-tax under the same words of exemption. That case is also an authority to shew that the exemption extends to public taxes as well as parochial assessments. Indeed the struggle in cases of this sort has mostly been to extend general words of exemption like the present to parochial taxes; for the rule is that *taxes* generally mentioned must be taken to mean *parliamentary* taxes, if the subject matter will suffer it (a). The case of *Williams v. Pritchard* also proves that where the intention of the legislature is not apparent to that purpose the general words of a latter statute shall not repeal the particular provisions of a former one. And to the same effect are *Gregory's case*, 6 Rep. 19. b. and *Frudgin's case* 21 Eliz., cited in *Foster's case* 11 Rep. 63. b. If it be said that the house and window duties are of a different nature from the land-tax, the former being a charge upon the person and the latter upon the real property, it may be answered that even the land-tax with respect to the public is a tax upon the tenant (b); for by the land-tax act the tenant is chargeable, as here, *in respect of the land*, though he may afterwards deduct it out of his rent: and all taxes are said to be a charge in viris (c). Besides in the case of *Eddington v. Borman* the same exemption was holden to extend to the assessments for cleansing and lighting the streets &c. which were to be paid by those who were liable to be rated to the poor. And though in strictness that case followed the decision of *Williams v. Pritchard*, the amount of the rate being to be ascertained by the quantum to which the houses were assessed

(a) *Brewster v. Kitchen*, 1 Lord Ray.
 317. *Lady Arran v. Crispe*, Salk. 221.
 (b) *R. v. Mitcham*, Dougl. 226. per

Buller J.

(c) Per Lord Holt in *Hopwood v. Bare-*
foot, 11 Mod. 240.

to the land-tax, yet the Court in giving judgment went on the ground that the tenant was equally exempt from the poor's rate. And that point was directly decided in *R. v. Scott* (a); where the question being whether the occupiers of certain charity-lands were exempted from the poor's rate under a private act of the 12 Car. 2. which directed that the *lands &c.* should be freed and discharged from all manner of taxes &c civil or military, and that the owners and occupiers thereof should not be taxed or otherwise charged *for or in respect of the said lands &c.* towards any public tax &c, this court held that the exemption extended to the poor's rate. Now it is clear that the poor's rate is a personal tax on the occupier (b); and yet the above cases shew that under an exemption from taxes in respect of certain land the occupier shall not pay the poor's rate which is imposed in respect of that property, although the tax in it's nature is personal and not a tax on the land. So here, admitting the house and window duties to be personal taxes on the occupier, yet being imposed on him in respect to the real property which is exempted from taxation, he must consequently be exempted from the payment of these taxes also.

Wood for the defendant. The statute of the 7 Geo. 3., though declared to be a public act, is in its nature and effect a mere private statute, relating altogether to local provisions within the city of *London*; and the clause in question giving the exemption from taxes and assessments is only a private contract between the corporation and the owners of the ground within the limits mentioned in the act, whereby if the latter chose to embank the river at their own expence the corporation consented that they should be free from all taxes and assessments whatsoever: that must necessarily mean such taxes and assessments as were of a local nature, and of which therefore it was competent to the rest of the inhabitants within the city to agree to take the whole burthen upon themselves instead of calling on these parties to bear their share of it. Of this nature is the land-tax, a certain quota of which is to be raised within the city. The sum to be raised upon each district being certain, it was immaterial to the public by whom in particular it was paid; and it was competent to the city to agree with the owners of this land that they should be exempted from contributing: but it never could have been the intention of the legislature, nor can it be collected from this act of parliament, nor from the decision of this Court in *Williams v. Pritchard*,

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(a) *Ante*, 3 vol. 602.

(b) *Vid. Rowls v. Gell, Consp.* 451.

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that these owners were to be exempted from the payment of any taxes of a general nature, by which the revenue of the country would be diminished without any equivalent or compensation to the public. But there is a provision at the end of the schedules A and B in the 38 Geo. 3. c. 40. which puts this question out of all doubt, even admitting that the clause of exemption relied on would otherwise have extended to this case. For, after imposing the several rates, and making certain exceptions in particular cases, (not including this) the act says, "the said several rates and duties to be charged in respect of every inhabited dwelling house, *without any other or further exemption being allowed than such as are contained and expressly provided for in and by this act, notwithstanding any former statute or statutes to the contrary.*" The plaintiff's argument therefore would operate as a repeal of the former exemption so far as relates to these taxes.

East, in reply, said that the clause last mentioned was introduced only for the purpose of guarding against any equitable extension of the exemptions contained in the act itself, some of which were of a very general nature; as *§. 5.* which exempts tenements containing not more than six windows, on account of the presumed inability of the occupiers to pay the duties. And as to the statute of the 7 Geo. 3. c. 37. being in the nature of a private contract between the city and the owners of the privileged lands, that argument was inconsistent with the principle of the determination in the case of *Williams v. Pritchard*, where the court held that the exemption extended to the land-tax which is a public and general tax.

Lord KENYON Ch. J. This act of parliament is (as the defendant's counsel has contended) to be considered as a contract between the respective parties, notwithstanding it is (as many other acts of the same kind are) declared to be a public act; for it was brought in on the petition of the corporation of *London*. When the act passed certain improvements of the property on the banks of the *Thames* were in view, and in order to encourage the scheme the lands to be improved were to be exempted from certain local taxes; of this nature was the land-tax; for that act imposes a general burden which is to be raised on the whole city, and therefore inter se the corporation might agree that the owners of this property should be exempted from bearing their share of it: but it was not the intention of the legislature to extend the exemptions further. This act was passed in the seventh year of the pre-

sent reign, and the others, under which the plaintiff was assessed, were not made until the thirty-eighth year of the reign; and the only question is whether or not the last which impose certain taxes on all persons (except in certain excepted cases, of which this is not one,) exempt the persons who were exempted in the first. Our former decision respecting the land-tax has been pressed upon us, as if it were supposed that we should act inconsistently in determining against the plaintiff in this case: but on the best consideration that I can give the subject, I approve of that decision, and think that there must be judgment against this plaintiff. Though the land-tax act was at the time of that decision in form only an annual act, it has been considered in substance as a permanent act; for if each land-tax act had been treated as a separate act of parliament standing by itself, the gross inequality of that tax that now obtains in different parts of the country would not have prevailed so long. But certain regulations having been made on a valuation in king *William's* time, that proportion has always been paid in the several districts since that time, on the ground that the land-tax, though renewed annually, was considered as a perpetual tax; and indeed now it is in fact become such. In deciding that case therefore we were guided by the intention of the legislature, who did not mean to exempt the owners of the land in question from the land-tax of one year only but from the land-tax in subsequent years. Then if that decision do not affect this case, it seems perfectly clear that the plaintiff is liable to pay the taxes in question. The last clause referred to in the statute 38 *Geo. 3. c. 40.* removes all doubt on the subject; though even without that I should have been of opinion that the plaintiff could not recover in this case.

GROSE J. The question is whether or not the legislature intended that the owners of this property should be exempted from the payment of these taxes; on that the last clause in the statute 38 *Geo. 3. c. 40.* seems decisive. The words of the act are general; but there are afterwards certain exemptions, of which this is not one; then follows the concluding clause that "no other or further exemption shall be allowed than such as are contained *and expressly provided for by that act*, notwithstanding any former statute to the contrary:" this is a short answer to the whole of the plaintiff's argument. But I should have had no difficulty in thus deciding from the other parts of the act: keeping a house

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with a certain number of windows belonging to it was considered as a criterion of the occupier's ability to pay such a public tax.

LAWRENCE J. It never could have been the intention of the legislature to exempt the owners of these houses from such taxes as the present; for part of them was imposed in lieu of the tax on tea, by the Commutation Act, and part instead of the tax on clocks and watches. The plaintiff's argument respecting the equitable construction of the last act is not well founded: the act does not say that there should be no equitable construction of it, but it enacts in express terms that there shall be no other exemption than those particularly specified.

LE BLANC J. of the same opinion.

Per Curiam,

Postea to the defendant.

Friday,
 Feb. 7.

DENN on the Demise of WROOT *against* FENN.

Ancient demesne must be pleaded within the first four days of the term.

THIS was a rule, (founded on an affidavit, stating that the lands for which the ejectment was brought were holden of the manor and soke of *Kirton*, and are ancient demesne, and that they are pleadable by writ of right close in the court of the said manor &c.) calling on the lessor of the plaintiff to shew cause why *Mary Hutton* the tenant in possession should not be made defendant instead of the casual ejector, and be at liberty to plead ancient demesne.

Parke, in moving for the rule, admitted that in *Smith v. Roe*, *Barn.* 331. it had been ruled that such a plea could not be pleaded after the four first days of the term, but said that in a subsequent case, *Roe d. Duchess of Hamilton v. Robinson*, 2 *Str.* 1120., the defendant was permitted to plead to the jurisdiction, after the first four days of the term, that the lands lay in the county palatine of *Chester*.

Peake now shewed cause against the rule. The objection to receive this plea is, that it is a plea in abatement; and it is a general rule that every plea in abatement must be pleaded within the first four days. This question appears to have frequently arisen in the late king's reign, when all the decisions (except that in 2 *Str.* 1120. and which may be explained) were uniformly against this application. *Holdfast v. Carlton*, Sir G. Co. 43. *Hil.* 1 *Geo.* 2.; *Smith v. Roe*, *Tr.* 7 & 8 *G.* 2. *ib.* 103. and *Barnes*, 331.; and *Bingham v. Barker*, *Tr.* 2 *G.* 2. cited *ib.* In *Goodtitle d. Symonds*

monds v. Thrustout, Barnes, 187. such an application as the present was refused; and the court said "If the plaintiff should prevail on this plea to the jurisdiction of the court, the judgment must be that defendant shall answer over; therefore if this plea be not confined to a time certain, great delay of justice must follow;" To which is added, "The rule discharged as to pleading ancient demesne, because the application was not made in time, that is, within the first four days of the term." And in *Doe d. Henant v. Thomas, Barnes*, 185, it was taken for granted that such a plea must be pleaded within the four first days. With regard to the case in 2 *Strange*, it does not appear that the application was made after the first four days of the term.

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There was another objection to this application, disclosed by the plaintiff's affidavit, that one of the stewards of the court below was a brother of the defendant: but *Parke* said he would undertake that the cause, if it were tried below, should be tried before the other steward.

Lord KENYON Ch. Jus. The case cited from *Strange* will not bear examination; it is objectionable on various grounds. However some difficulties, not mentioned at the bar, have occurred to the court. But, as it is for the advancement of justice that this cause should be tried in the superior court, I am inclined to adopt the cases cited from *Barnes*, and not permit the defendant now to put in this plea.

Per Curiam,

Rule discharged (a).

(a) But see *Marshall v. Allen*, *Palm.* 406, and *Latch.* 83, 84; and *Welles v. Trabern*. *Will. Rep.* 239.

DAVIS *against* TROTTER.

Friday,
Feb. 7th.

IN an action against the sheriff of *Surrey* for an escape a verdict was taken for the plaintiff for 1 s., with liberty to the defendant to move to enter a nonsuit if this Court should be of opinion that the action were not maintainable. The case appeared to be this; the bankrupt had surrendered within the forty-two days allowed by the statute 5 *Geo. 2. c. 30.*, and the commissioners not being able to finish his examination within that period enlarged the time; after which, and within such enlarged time, he was arrested at the suit of the plaintiff, and upon producing the notice

Under the
5 *Geo. 2.*
c. 30. s. 5.
If the bank-
rupt surren-
der within
the forty-two
days after
notice &c,
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sioners may
by their own
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enlarge the
time for tak-

ing his examination, during which enlarged time the bankrupt is privileged from arrest.

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of the commissioners to that effect, the bankrupt was discharged from his arrest by the sheriff's officer; for which alleged escape this action was brought. And the question was whether or not the bankrupt were privileged from arrest, the order for enlarging the time of his examination being by authority of the commissioners only, and not under the great seal.

The first Section of the statute enacts that every bankrupt not surrendering within forty-two days after notice &c. shall be guilty of felony: and by *§. 3.* the Lord Chancellor may enlarge the time for surrendering, not exceeding fifty days more. Then *§. 5.* enacts that "every bankrupt having surrendered as aforesaid shall at all seasonable times before the expiration of the said forty-two days, or such further time as shall be allowed to such bankrupt to finish his examination, be at liberty to inspect his books &c.; and in order thereto the said bankrupt shall be free from all arrests of any of his creditors in coming to surrender, and from the actual surrender of such bankrupt to the said commissioners during the said forty-two days or such further time as shall be allowed to such bankrupt for finishing his examination as aforesaid, provided such bankrupt was not in custody at the time of such surrender. And in case such bankrupt shall be arrested for debt &c. coming to surrender himself, or after his surrender shall be so arrested within the time before-mentioned, that then on producing such summons or notice under the hands of the commissioners &c. to the officer who shall arrest him &c., he shall be immediately discharged."

Garrow and *Marryat*, on moving to enter a nonsuit, referred to *Perrot's* case (*a*) as in point to shew the power of the commissioners to enlarge the time for taking the bankrupt's examination, provided he surrendered within the forty-two days; though the Lord Chancellor only had authority to extend the time for the bankrupt's surrender in the first instance beyond that period. And if the commissioners had such power it followed (they said) that the bankrupt was privileged from arrest during the period of the time so enlarged. In that case Lord *Mansfield* said "The examination is not confined to be within the time limited for the bankrupt to come in and surrender and submit to be examined. The bankrupt must indeed surrender within the limited time, and he must submit within the limited time to be examined from time

(a) 2 Burr. 1122.

to time &c; but the act does not require the examination to be full and completed within the limited time."

Erskine was to have shewn cause; but

Lord KENYON Ch. J. said he was quite satisfied that he ought to have nonsuited the plaintiff at the trial. That it was clearly understood in the case referred to that the commissioners had a power of enlarging the time beyond the forty-two days, provided the bankrupt surrendered within that time, and that the words and good sense of the act required that construction.

Per Curiam,

Rule absolute for entering a nonsuit.

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The KING *against* the Inhabitants of ST. PETER of
MANCROFT in NORWICH.

Saturday.
Feb. 8th.

TWO justices by an order removed *S. Gayfer* from *Botesdale* in *Suffolk* to the parish of *St. Peter of Mancroft* in *Norwich*; on appeal the sessions confirmed the order, and stated the following case for the opinion of this court.

"*Sarah Gayfer* the pauper was let to *Mrs. Morton* of the parish of *St. Peter of Mancroft* about a fortnight before *Michaelmas* 1797 by a letter sent by *Mrs. Morton* to the pauper's friends, stating that she gave 3*l.* a-year wages, on which the pauper agreed to go, and sent to her mistress to let her know when she should come; and in consequence of a second letter, desiring her to come on *Thursday* the 11th day of *October*, she went to her service on the 12th of that month: on her going her mistress objected to her not having come the day before, for which the pauper gave as a reason, that she had only quitted her last place late on Old *Michaelmas*-day. About three weeks after she went the pauper said to her mistress that it was proper to come to some agreement as they had never had any further than a few lines, to which her mistress answered "You know what wages I sent you word, and as the general way is to let for a month's wages or a month's warning, I do not wish to confine you for a year;" but did not say any thing about not chusing to hire for a year. She received her wages quarterly; and about a fortnight before New *Michaelmas*-day her mistress asked her, whether she chose to go away on New *Michaelmas*-day or Old *Michaelmas*-day? assigning as a reason for her asking that she had hired a new servant who wished to come to her at New *Michaelmas*. The pauper said it was immaterial to her as she had

The sessions should state as a fact (in a settlement case) whether the master dispensed with the service before the end of the year, or whether there were a dissolution of the contract by mutual consent.

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not got a place, and agreed to go at New *Michaelmas*, which she did; at which time the other servant came into her mistress's service. Her mistress was not in a condition of life to keep two servants; and if a place had offered at New *Michaelmas* the pauper looked upon herself as in a situation to take it, though when she first got to her mistress she considered herself as to live with her until Old *Michaelmas*. On quitting her service on New *Michaelmas*-day, which was a fortnight after the agreement to go, her mistress paid to her the whole which remained due of the 3*l.* wages, although at the time when the pauper agreed to go away at New *Michaelmas* nothing was said about wages. The pauper would not have objected to going away at New *Michaelmas* if her mistress had proposed to make a deduction for the time, but would have mentioned it to her and told her she was willing to stay till Old *Michaelmas*. The pauper liked to go away at New *Michaelmas* rather than Old *Michaelmas*, but would not have staid after Old *Michaelmas* if her mistress had requested her. The pauper considered the conversation which passed on the fortnight before New *Michaelmas* as a month's warning to go away at Old *Michaelmas*."

When this case came on for argument,

Lord KENYON Ch J. took an opportunity of expressing his regret that the courts of quarter-sessions departed from the rule formerly established, by stating evidence instead of facts in the special case: but added that upon this case, as disclosed, there was strong evidence to induce the court of quarter-sessions to adjudge that the contract between the mistress and the servant was dissolved before the end of the year, and consequently that the latter did not give a settlement in *Saint Peter's Norwich*. That the distinction established in all the cases was perfectly clear; that where the servant continued liable to serve during the whole year, though the master dispensed (a) with the actual service for any part of it, the servant gained a settlement, because the relation of master and servant subsisted all the year and the master might resume the right to the service if he chose; but that where the parties absolutely put an end to the contract before the expiration of the year, as in the present case, the servant did not gain a settlement (b). That, though it was at first doubted whether

(a) Vid. R. v. *Richmond*, Burr. S. C. 740; R. v. *St. Bartholomew*, Cald. 48; R. v. *St. Philip Birmingham*, ante, 2 vol. 624; R. v. *St. Andrew Holborn*, ib. 627; and R. v. *St. Mary Lambeth*, ante, 236.

(b) Vid. R. v. *Cosflechurch*, Burr. S. C. 68; R. v. *Gresham*, ante, 1 vol. 100; R. v. *Grantham*, ante, 3 vol. 754; R. v. *Claydon*, ante, 4 vol. 100; and R. v. *Whittlebury*, ante, 6 vol. 464.

or not the master could dispense with the service at the end of the year so as to give the servant the benefit of the contract for the purpose of a settlement, it had been long settled that it was immaterial whether the service were dispensed with at the beginning, the middle, or the end, of the year.

GROSE J. The court of quarter-sessions should state the result of the evidence; and in a case of this kind they should state the fact one way or the other, whether this were a dispensation with the service or a dissolution of the contract.

The counsel in support of the order of sessions saying there were reasons that would probably induce the sessions to decide that there was a dispensation with the service,

The Court ordered the case to be sent down to be restated.

Alderson in support of the order of sessions.

Mure against it.

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The KING *against* The Inhabitants of WOBURN.

Saturday,
Feb. 8th.

TWO justices by their order removed *T. Williams* and his wife together with their six children from the parish of *Leighton Buzzard* in the county of *Bedford* to *Woburn* in the same county: The sessions on appeal affirmed the order, subject to the opinion of this court on the following case.

J. Williams, the father of *T. Williams* the pauper, previous to the year 1756 was settled with his family in *Leighton Buzzard*. The pauper was born in that parish and baptized there in the year 1756. In 1763 *J. Williams* removed with his family, of which the pauper was a part, to *Woburn*, and gained a settlement there in 1774. In 1772, previous to such settlement, the pauper entered into the *Bedfordshire* militia as a drummer with the consent of his father, who was then a serjeant in the same militia; the pauper continued in the station of a drummer in the said militia until he was twenty-three years of age; and during such time his pay was received by his father. From the time of the pauper's entering into the militia until the year 1788 when he married, he lived in his father's family, except at the times when he and his father were absent upon duty in the militia. The pauper had gained no settlement in his own right.

A drummer under age entered into the same militia in which his father was serjeant, and lived with his father, the latter receiving the son's pay: held that a settlement gained by the father during such time was communicated to the son.

Wilson and *Wyatt*, in support of the order of sessions, after stating the question to be whether or not the pauper were emancipated

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from his father's family in the year 1774, for if not the settle-
 ment then acquired by his father in *Woburn* was communicated
 to him, were stopped by the Court.

Bond and Scott contra. The pauper was emancipated in 1772,
 when he entered into the *Bedfordshire* militia as a drummer, and
 consequently he is settled at *Leighton Buzzard* where his father
 was then settled. In *R. v. Walpole St. Peters* (a) it was holden
 that the pauper, who at the age of sixteen enlisted as a soldier, was
 thereby emancipated from his father's family, and did not take a
 derivative settlement acquired by the father after he was discharged
 from the army. So in *R. v. Witton cum Twambrooke* (b), Lord
Kenyon, in enumerating the different modes by which a son might
 be emancipated, referred to this case, "or (as in the case of the
 soldier) having contracted a relation which was inconsistent with
 the idea of his being in a subordinate situation in his father's
 family." Now that decision and that reasoning equally apply to
 this case. This pauper, when he entered into the militia in the
 character of a drummer, contracted a relation inconsistent with the
 idea of his being in a subordinate situation in his father's family. He
 then ceased to be under his father's control, and was subject to
 military authority. It is not necessary to contend that every
 minor who enters a private into the militia in time of peace, and
 serves only twenty-eight days in the year, is thereby emancipated,
 though in *R. v. Roach* (c) it was holden that the pauper, who was
 only absent from her father eight weeks during which time she
 went into service, was thereby emancipated. The case of a
 drummer differs from that of a private militia-man, because dur-
 ing the whole year he is subject to military law. He receives
 pay the whole year, whether the regiment be or be not embodied.
 By stat. 2 *Geo.* 3. c. 20. §. 38. a drummer is compellable to serve
 (not for a limited time as a private, but) "until legally dis-
 charged." By statute 4 *Geo.* 3. c. 17. §. 8. he is under the com-
 mand of the adjutant or superior officer the whole year, and liable
 to punishment for disobedience of orders or neglect of duty, even
 when the regiment is not embodied. By statute 26 *Geo.* 3.
 c. 107. §. 88. he is liable to be tried by a court martial for offences
 committed against the mutiny-act at times when the regiment is
 not embodied. A drummer in the militia therefore is, as far as
 respects this question, in the same situation as a private soldier in
 a marching regiment. During the whole year the serjeants and

(a) *Burr.* S. C. 638.(b) *Ante*, 3 vol. 355.(c) *Ante*, 6 vol. 247

drummers are not only liable to be called on but actually have a military duty imposed on them even when the regiment is not embodied; they are placed in the town where the arms of the regiment are deposited to guard them, and are under the immediate inspection and orders of the adjutant; they cannot leave that town without the consent of the adjutant or other officer commanding. If therefore during the time when this pauper was serving as a drummer his father had been removed by an order of justices, the son could not have been removed with him as part of his family, because that would have subjected him to punishment under the Mutiny Act. Or if the father had voluntarily removed to any other part of the kingdom, and the adjutant had insisted on detaining the drummer in the town where the arms were deposited, the father could not have obtained the custody of his son by Habeas Corpus. And by thus ceasing to be under his father's control and authority he was emancipated. The two circumstances stated in the case, of the pauper continuing to live with his father the whole time, and of the father receiving the son's pay, are immaterial in this case. The first was merely accidental, owing to the father's being also a serjeant in the same regiment: he lived in the same place as the father, not as part of his father's family and subject to the control of the father as an individual, but as a drummer in the same regiment with the father. And with regard to the pay; that was received by the father, not in his own right, but as agent for his son, and it was consented to by the son perhaps as an equivalent for his board: it must have been with the son's consent; for the son, if he had so chosen, might have received it himself and paid any other person for his board.

LORD KENYON Ch. J.—The justices who made this order of removal and those at the sessions who confirmed it on the appeal were of opinion that the pauper was not emancipated from his father's family. The opinion of the magistrates below, however respectable, ought not indeed to be conclusive on this court when a special case is reserved for our determination: but I am glad to find that their opinion coincides with ours and with the decisions on this subject. The argument that has been used in support of the present rule, if it prove any thing, proves too much; for it tends to shew that if a child be for any period of time, however short, under any other control than that of the father, he is thereby emancipated from his father's family. That is the case of every private in the militia, even in time of peace; he is subject

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to military control during a part of the year, and therefore not under the father's control during that time; and yet it was not contended that such a person is by that mean emancipated. But the decisions upon this subject have put this question at rest; and it would be unfortunate for the children if the argument now pressed upon the court were to prevail. A drummer is generally taken at a very early period of life, when he is only seven or eight years of age; and if he only continue in that situation for twenty-four hours he is (it is said) emancipated from his father, he is to be taken from the protection of his father, and if the father is removed elsewhere the child is to remain unprotected; the proposition is monstrous. In the case of *R. v. Walpole St. Peters*, where it was holden that the pauper who had enlisted himself as a soldier was emancipated, the court proceeded on this ground, that he was engaged to serve for life, and was liable to be sent into foreign countries. But a son is not emancipated by the circumstance of his being under some other control than that of his father. For in another case, *R. v. Halifax (a)*, where the son served an apprenticeship for four years during his minority, it was decided that he was not emancipated from his father; and yet during the time of the apprenticeship he was not under his father's control. In contemplation of law there may be two kinds of control; a son may be under the control of his father, and also under the control of the law, as if he be ordered to assist a constable in the execution of his duty; that is a temporary control. I am therefore of opinion that this pauper was not emancipated from his father at the time when the latter gained a settlement in *Woburn*, and that a contrary decision would be attended with mischievous consequences.

GROSE J.—The question is whether or not the pauper ceased to be part of his father's family in the year 1774, in deciding which common sense will go a great way to guide us. It is said that he ceased to be part of his father's family when he entered into the militia as a drummer; but it appears by the case that he was only sixteen years of age at that time, that he entered with the consent of his father who was a serjeant in the same militia, that his father received his pay, and that from the time when he first entered until he married he lived in his father's family, except at those times when he and his father were absent upon duty in the militia. Upon this state of the case I think that he

(a) *Burr. S. C.* 206.

continued under his father's control, and was a part of his father's family in the year 1774.

LAWRENCE J.—I do not find any case in which it has been decided that a subsequent settlement gained by the father cannot be communicated to the son unless where the son has been actually separated from the father. In the cases cited of the soldier and of the nurse, the children were absent from the father's family; and in the latter case the daughter was an adult at the time of her absence. In *R. v. Halifax*, though the son was an apprentice under the control of his master, yet as he returned to his father's house after the apprenticeship was at an end, it was holden that the father's subsequent settlement was communicated to him.

LE BLANC J.—In the case of *R. v. Walpole St. Peter's*, on which the argument in this case is founded, the son had totally quitted the father's family; he had been with his regiment for four years, during which time he was totally independent of the father. But in this case the pauper never ceased to be part of his father's family before the year 1774, when the father gained a settlement in *Woburn*. It is said however that the pauper was emancipated, because he had entered into an engagement which for a time subjected him to a control different from that of the father: but suppose, instead of this, he had engaged to live as a servant with a farmer in the neighbourhood for six months, he would during that time have been under the control of the master, but on returning to his father's family he would again have become subject to his father's control, and would not have been emancipated. So here the pauper continued to be part of his father's family in the year 1774, and as such the settlement gained by his father at that time was communicated to him.

Per Curiam,

Order of sessions confirmed.

BURGH and Others Assignees of R. WHEELER a Bankrupt *against* PRESTON.

Monday.
Feb. 10th.

THIS was an action of debt on two bonds given by the defendant to the bankrupt; the one dated the 8th of *January* 1790 in the penal sum of 10,000 *l.*; the other dated *September* 16th 1791 in the sum of 20,000 *l.* The defendant cravedoyer of the condition of the first bond "and memorandum annexed and subscribed

A bond was conditioned that the obligor should indemnify the obligee from all sums the latter should pay or

be liable to pay on the obligor's account; and before the execution of the bond a memorandum was thereon indorsed, that the obligee "bath given an undertaking not to sue upon the bond until after the obligor's death:" held that this memorandum was to be taken as part of the condition; and made the bond in effect payable only by the representatives of the obligor after his death,

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to the said writing obligatory." The condition was that the defendant should pay to *Wheeler* all such sums as *Wheeler* had advanced or paid for or on account or was liable to pay for or on account of the defendant or should at any time thereafter pay or be liable to pay for or on account of the defendant by reason or means of the defendant having drawn or thereafter drawing any bill of exchange upon *Wheeler* &c. The memorandum was this; "The before named *R. Wheeler* hath given an undertaking not to bring any action or suit upon the before written bond or assign the same until after the death of the said *R. Preston*." The defendant then craved oyer of the condition of the second bond and memorandum, which were of the same kind; and then pleaded that the memorandum to the first bond was written annexed and subscribed to the bond before the sealing and delivery thereof by him the said defendant, and that the defendant is still living; he also pleaded in the same way respecting the other memorandum &c. To this plea there was a general demurrer, and joinder in demurrer.

Giles, in support of the demurrer (a), admitted that if the memorandum, written before the execution of the bond, were intended by the parties to be taken as part of the condition of it, the case of *Broke v. Smith* (b) was decisive that it might be pleaded as such, notwithstanding what is said in *Bro. Abr.* tit. "*Faites*." pl. 72; & 2 *Roll. Abr.* "*Faites*." G. pl. 8. But he contended that this memorandum was not intended to make part of the deed. It is merely a memorandum of something which had before that time been agreed upon; but it is not the agreement itself. The words are that *Wheeler* "*hath* given an undertaking;" clearly referring to some other prior agreement. The agreement itself should have been set forth in order that the court might put a legal construction upon it, as connected with the condition of the bond. It does not therefore even amount to a covenant not to sue. But taking it to be in effect a covenant not to sue, it cannot be pleaded as a release in bar of the action; but the breach of it is a substantive ground of action in itself. It is true that a covenant by an obligee not to sue his obligor at all will enure as a release, and may be pleaded in bar of an action on the bond, in order to avoid a circuitry of action; as was agreed in *Smith v. Mapleback* (c), and *Dean v. Newhall* (d). But that only holds

(a) This case was agreed on a prior day
in this term.

(b) *Moor*, 679.

(c) *Ante*, 1 vol. 446.

(d) *Ante*, 163.

good where the covenant not to sue is co-extensive with the right of suing, and not where such covenant not to sue is only for a limited time, as in *Ayliffe v. Scrimshire* (a). Now this is an agreement of that kind; for at most it is only an undertaking not to sue upon or assign the bond during *Preston's* life. But even taking the memorandum to be part of the condition, this action which is brought by the assignees and not by the bankrupt himself is no breach of it; for it is only a personal contract, and he has no control over the assignees. Bro. Abr. tit. "Conscience," pl. 1. And here too the condition was not broken until after the bankruptcy. [Lord *Kenyon* C. J. said it was clear that the assignees must take the bankrupt's property subject to all his legal contracts and equities.]

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Dickens for the defendant. The memorandum must be taken to be part of the condition, and incorporated into it. This was decided in *Broke v. Smith* (b), and must have been taken for granted in *Steadman v. Purchase* (c); otherwise no notice could have been taken of the memorandum as a separate instrument for want of a stamp and because it was not signed by the parties. As to the words "*hath given*" &c; those are common words of grant in all conveyances, and are not taken in a retrospective sense. The effect of the memorandum is not to destroy the condition of the bond as first expressed, but to explain it. It is only a stipulation not to take advantage of it during the lifetime of the obligee. It operates however as a release during that period, according to the doctrine in *Lacy v. Kinaston* (d), and may consequently be pleaded in bar.

Giles, in reply, said that the memorandum was repugnant to the condition before expressed in the bond; that the two could not stand together; and that the defendant himself had pleaded it as a separate instrument.

Cur. adv. vult.

Lord KENYON C. J. now delivered the opinion of the Court. After stating the case, his lordship proceeded thus; The question is what is the effect of this memorandum? and we are of opinion that it was the intention of the parties that this should be taken as part of the condition of the bond. It is like the common case of a condition annexed to an obligation to postpone the payment for a certain time; the bond is given for a certain sum, but with a condition that if before such a day the obligor pay such a sum

(a) 1 *Show*, 46.

(b) *Moor*, 679.

(c) *Ante*, 6 vol. 737.

(d) 1 *Ld. Ray*. 690.

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either by instalments or as a gross sum, then the bond shall be void. In this case the question is only what was the intention of these parties? and it appears to us that they intended that the obligor should not be called upon to pay this money during his lifetime, but that the payment should be deferred until after his death, and then be made by his executors; and there is nothing illegal in such a contract. If this had been a covenant not to sue at all, it would have operated as a release; and the debt, once released, would have been gone for ever. This is not like some of the cases in the books, where there was a collateral agreement (in a different deed) not to sue, in which the courts have said that the party must resort to his agreement and cannot plead it as a release. For here the memorandum was annexed to, and was subscribed before the execution of, the bond; and our decision is fully warranted by the case cited from *Moor* 679. There the question was whether or not a memorandum indorsed on a bond before the execution of it should be considered as explanatory of the intention of the parties respecting the operation of the condition; *Popham* J. was clearly of opinion that it should, it being a cotemporary act; and though some of the judges at first doubted of this, they afterwards agreed in opinion with *Popham*. In this case therefore we are of opinion that the parties intended that it should not be in the power of the obligee to enforce payment of the bond from the obligor during the lifetime of the latter, but that payment should be made by the executors of the obligor afterwards; and consequently the defendant is entitled to the judgment of the court.

Judgment for the defendant.

LORCK against WRIGHT.

Monday,
Feb. 10th.

The plaintiff is entitled to the costs up to the time of the defendant's paying money into court, though the plaintiff afterwards enter the record for trial and withdraw it.

IN this case the defendant having paid money into court, the plaintiff twice carried down the record for trial and withdrew it; after which he took out a judge's summons, in the last vacation, to discontinue the action on payment of costs. And now

Giles moved, on behalf of the plaintiff, that the master might allow him his costs to the time when the money was paid into court, that the amount might be deducted out of the subsequent costs, and the balance paid to the plaintiff, the plaintiff undertaking to pay the

the balance if it should be in the defendant's favour. And he cited the cases of *Hartley v. Bateson*, ante, 1 vol. 629; *Stevenson v. Yorke*, ante, 4 vol. 10; *Kabell v. Hudson* ib.; and *Seymour v. Bridge*, ante, 403; to shew that where money is paid into court the plaintiff is entitled at any time before trial to the costs up to the time when the money was paid in.

Alderson opposed this motion in the first instance; and observed that this was an attempt to carry the rule further than it had ever been extended; for that there was no instance in which it had been holden that the plaintiff might apply for his costs after the record had been entered for trial; that it was admitted in all the cases on this subject that the plaintiff is not entitled to the costs incurred up to the time of paying money into court, unless he make his application before trial; and that the circumstance of the plaintiff's having entered the record and withdrawn it was for this purpose tantamount to a trial. But

The Court thought that, though this case was new in specie, it fell within the principle on which the cases cited by the plaintiff were decided; and therefore they made the

Rule absolute.

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BLAKE *against* FOSTER.

Tuesday,
Feb. 11th.

THIS was an action of covenant on an indenture, dated May 16th 1778, by which *Blake* and *Sarah* his wife demised certain tenements to the defendant for twenty-one years from *Lady-Day* then last, and in which the defendant covenanted to repair &c. The breach assigned was, not repairing. The defendant, (besides pleading non est factum, and that he did repair &c, on which issues were taken,) pleaded, thirdly, that before the making of the indenture, to wit, on the 23d of June 1768 *T. Woodward* being seised in fee of the demised premises by will devised the same to *C. Knowles* and *R. Trowbridge* and their heirs for ever to the use of them and their heirs, upon certain trusts therein particularly mentioned, and, amongst others, upon trust that they and the survivor of them and the heirs of such survivor should from time to time during the life of the said *Sarah*, the wife of the said *Henry*, pay the rents issues and profits thereof (subject as therein mentioned) to the said *Sarah* and her assigns or otherwise permit and

To an action by a lessor for a breach of covenant on an indenture of lease in not repairing &c, the lessee cannot plead in bar that the lessor had only an equitable estate in the premises; for that is tantamount to a plea of nil habuit in tenementis. But, semble, the lessee is not estopped from shewing that the lessor was only seised in right of his wife for her

life, and that she died before the covenant broken, because an interest passed by the lease.

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suffer her and them to receive and take the same to and for her and their own use and benefit, and after her decease upon certain other trusts therein particularly mentioned; by virtue of which devise *Knowles* and *Trowbridge* after the decease of *Woodward* and before the making of the indenture to wit on &c entered &c and became and were seized thereof upon the trusts in the said will mentioned; whereupon the plaintiff and *Sarah* his wife in right of the wife became and were entitled to the rents issues and profits of the said premises under and by virtue of the said devise; and being so entitled they the plaintiff and *Sarah* his wife in right of the wife made the said indenture; that after the making of the indenture and before the expiration of the term, to wit, on the 1st of *January* 1790 *Sarah*, the plaintiff's wife, died; whereupon the indenture and the term thereby created and the said estate and interest of the plaintiff in the demised premises ceased and became and were wholly void ended and determined; averring that the demised messuages &c did not become nor were ruinous &c at any time during the life of *Sarah*, the plaintiff's wife. The defendant in another plea pleaded that before and at the time of making the indenture the plaintiff and his wife in right of his wife were seized in their demesne as of freehold, to wit, for and during the life of the said *Sarah* of and in the demised premises; that after the making of the indenture and before the expiration of the term, to wit, on the 1st of *January* 1790, *Sarah* (the plaintiff's wife) died, whereupon the indenture and the term thereby created and the estate and interest of the plaintiff of and in the demised premises ceased and became and were wholly void ended and determined.

To the third plea the plaintiff demurred, and assigned for causes of demurrer, that it is not admitted by the said plea that either the husband or wife had any estate in the demised premises at or after the making of the said indenture, nor that any estate or interest passed either from the husband or the wife by the said indenture; that it is not alleged by that plea that the husband had not any estate of his own in the demised premises at or after the making of the demise. He also demurred specially to the fourth plea for these causes, that it is not alleged or shewn by that plea how or in what manner the husband and wife in right of the wife became entitled to the demised premises for the life of the wife, nor how their title commenced; that the defendant by this plea attempted to plead a particular estate or title without shewing the commence-

commencement of it; and that the defendant has not by this plea alleged or shewn that the husband had not any estate of his own in the demised premises at or after the making of the demise, nor admitted or denied that any estate or interest passed from the husband by the said indenture.

Abbott in support of the demurrer (a). The defendant by his third and fourth pleas contends that though he has enjoyed the premises demised to him by the plaintiff during the whole term, yet he is not bound to keep them in repair, because the lessor, whose title he controverts, had no authority to lease them, and cannot now enforce the covenant. The general rule is clear that a tenant holding by indenture is estopped to plead to an action on his covenant that his landlord nil habuit in tenementis (b). Now the first special plea amounts in substance to the same thing; for the bar therein insisted on is that the lessors had only an equitable interest in the premises, and consequently no power to lease. There is also another rule, that every estoppel must be reciprocal, and bind both parties (c); therefore as the plaintiff would have been estopped from setting aside the indenture on the ground that he had only an equitable interest in the demised premises, so neither can the defendant plead such matter in bar. This rule applies also to the last plea; and there are many authorities which shew that the defendant in this case is estopped from setting up such a defence. *Bro. Abr.* tit. "*Avowry*," pl. 123.; and "*Dette*," pl. 7.; referring to 9 *H. 6.* 43. In trespass for taking the plaintiff's cattle the defendant avowed for rent under an indenture of lease to the plaintiff, to which the plaintiff replied that the defendant had nothing in the land except in right of his wife, who died without issue before the taking &c (shewing therefore that he was not tenant by the curtesy,): But by the court the husband might avow or bring debt for the rent notwithstanding; and the tenant was estopped till the entry of the heir. The court also in *Dixon v. Harrison* (d), referring to the above case, observed that "it was not adjudged, but is much the better opinion of the book." The same case is cited with approbation in 4 *Bac. Abr.* tit. "*Leases*," p. 17. C.; where Lord Ch. B. *Gilbert*, the author of that treatise, assigns this reason why the husband may avow for the rent till the actual entry of the heir, because the lease was at

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(a) On a former day in this term.

(b) *Parker v. Manning*, ante, 7 vol. 537.;
Lit. f. 58. *Co. Lit.* 47. b. *Brudnell v. Ro-**berts*, 2 *Wils.* 143. *Cooke v. Loxley*, ante,
5 vol. 4.(c) *Co. Lit.* 352. a.(d) *Vaugh.* 46.

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first good and drawn out of the seisin of the wife, and therefore remains good between the lessor and the lessee till avoided by the entry of the heir. So here the estate was good by estoppel till the entry of the remainder man. In *Jeffrey v. Guy* (a), which was debt on bond brought by *Guy* against *Jeffrey* conditioned to perform covenants, one was that *Guy* might come on the land to inspect the repairs of a house demised for years to *Jeffrey* by *Guy* and *Katherine* his wife. The case was that one *J. B.* and the said *Katherine* were tenants in tail of the house, and had issue *William*; and after *J. B.*'s death *Katherine* intermarried with *Guy*, and they made the demise to *Jeffrey* by indenture with the covenant above-mentioned. *Jeffrey* pleaded in bar the former intail and the death of *Katherine*, and that *William* the issue in tail entered before the covenant broken. *Guy* replied that *William* came upon the land with him to see if the repairs were made, absque hoc that *William* entered modo et formâ; and on issue thereon it was found for the plaintiff; and judgment was given for *Guy* in *C. B.*, which was affirmed on error brought in *B. R.*: but the only error assigned was that there was no breach of covenant alleged against *Jeffrey*. That case confirms the former opinions; because it shews that the entry of the heir was considered as material in order to avoid the lease; the issue was taken on that fact, and it was not contended that it was an immaterial issue. It is also cited as an authority for this purpose in the same place in *Bac. Abr.*, where this observation is made, "because until the entry of the issue the lease was still subsisting, and consequently the lessee bound by his covenants in such lease." And finally the lease was sustained, because it was found that the heir had not entered. But it will be argued that by the last of the special pleas it is admitted that an interest passed, and so there could be no estoppel. Such a distinction is indeed mentioned in *Co. Lit.* 45. a. but no reasons are stated for it; and on the contrary it is said in other books that no good reason can be given for it. The same doctrine is alluded to in *1 Ventr.* 358., where it is said that if lessee for ten years make a lease for twenty years and afterwards purchase the reversion, it is good for ten years, but shall not bind him for the residue, because he had no more interest in him at the time than for the ten years. But *Bac. Abr.* 192., referring to this case, adds a quære; because the reason does not seem satisfactory. And in the case in *Ventris, Pemberton Ch. J.* said that the difference was where the party

(a) *Yelv.* 78.

making the estate has a legal estate and where a defeasible estate only; for in the latter a lease may work by estoppel, though an interest passed, so long as the estate out of which the lease was derived remained undefeated. Now here the entry of the heir was necessary in order to defeat the lease. What is said in *Co. Lit.* 45. a. was probably taken from the case in *Moor* 20., as said by three judges: but the Report in *Dal.* 26. is more full; and there it is stated that if a lessee for life lease for years, and afterwards purchase the reversion, and die within the term, the heir in reversion may confess and avoid the lease: but it does not follow from thence that the lessee might; and besides it was not an adjudged case; for it is put under a *nota*. At all events however an estate which a man has *jure uxoris* is very different from an estate in his own right *pur autre vie*; for the former derives its force from *her* estate and his controlling power over it; and he has no more interest in the estate than a stranger. It is the lease of the wife alone, and therefore operates against the husband by estoppel only; and consequently against the lessee in equal degree. But independently of the objections to the substance of these pleas, the last is bad in point of form, for the causes assigned in the demurrer. First, Non constat but that at the time of the lease granted the husband and wife were seised in right of the wife for her life with remainder in fee to himself, in which case the lease would have been good against him by estoppel, and consequently so against the lessee. And though a landlord is not bound to shew title against his tenant, yet the tenant in pleading title in another against his landlord is bound to negative his landlord's title in every manner by which it might avail. The last plea is also bad in another respect, in not shewing the commencement of the particular estate; for it is a constant rule that, if a smaller estate than a fee be alleged in-pleading, the commencement of it must be shewn.

Jervis contra. The general rules, that a tenant cannot plead against his landlord *nil habuit in tenementis*, and that estoppels are mutual, do not apply in this case to estop the defendant from disclosing the facts stated in the third and fourth pleas; in the first of which it is alleged that the plaintiff's wife had an equitable estate for life in the demised premises, and in the last that she had a legal estate for life at the time of the lease made; that she is since dead, whereby the lease became determined; and that no breach of covenant was committed before that time. The ground on which the defendant contends that he is not estopped from plead-

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ing these facts is, because the lease was good at its commencement, and an interest passed under it. As to the first special plea; though at common law the lease of cestuy que trust could not be supported, he being a mere stranger to the land, and his entry upon it a trespass (a), and consequently his lease could not have enured by way of passing an interest, but only as a conclusion, yet such a lease may take effect by virtue of the statute 1 Ric. 3. c. 1., according to the facts disclosed in the first special plea, and by virtue of the common law according to the last plea. That statute enacts that every statute of feoffment lease &c. shall be good and effectual against the feoffor grantor &c. and against all others having or claiming any interest or title in the lands only to the use of the same feoffor &c. and his heirs, at the time of the grant made &c. Under this statute cestuy que use acquired the jus habendi et disponendi, though the freehold remained in the trustees, and his entry is good for the purpose of making a lease. But the construction of that statute has always been that the grant is only good for such estate as cestuy que use could have legally made if the legal estate had been in him: and therefore where cestuy que use for life, remainder in tail, leased for the life of the lessee and died, it was holden that the lessee was only tenant at sufferance after the death of cestuy que use (b). The plaintiff's wife therefore being cestuy que trust of the premises for life, the plaintiff her husband was entitled to make this lease for her life; and then according to *Treport's* case (c) the lease for years of lessee for life by deed indented shall be no estoppel after his death, because at the commencement it took effect by way of passing an interest. So in *Co. Lit.* 47. b. "A, lessee for the life of B, leases for years by deed indented, and after purchases the reversion in fee. B dies. A shall avoid his own lease; for he may confess and avoid the lease which took effect in point of interest and determined by the death of B." And Lord *Holt* (d), speaking of that case, says, the reason of it is because tenant for life had a freehold which is a greater estate, and the lease will need no estoppel if the life endure. The same doctrine is laid down in *Moor.* 20. and *Cro. Eliz.* 700. As to the authorities cited on the part of the plaintiff from *Bro. Abr.* "Avowry," pl. 123., and "Dette," pl. 7., and from *Vaugh. Rep.* 46., all which depend upon the case in the *Year Book*, 9 H. 6. 43., it is sufficient to say that the question of estoppel did not expressly

(a) *Keilw.* 42. b. *Plowd.* 349.(b) Lord *Zouch's* case, *Dy.* 57. b. and *Bac. Abr.* tit. Feoffment to Uses, pl. 2.*Palm.* 352., &c.(c) 6 *Co.* 15. a.(d) In *Gilman v. Hoare*, 1 *Salk.* 275.

arise there; and when the same case is abridged in *Bro. tit. "Trespass,"* pl. 18. as an action of trespass by lessee for years against his lessor, it is said that it was not adjudged. The case of *Jeffrey v. Guy*, as reported in *Yelv.* 78., does not warrant the abridgement of it in *Bac. Abr.*; for the question before the Court turned altogether upon the form of the pleadings, and not upon the consideration whether the entry of the heir in remainder were necessary to avoid the lease upon the death of the tenant in tail. But whatever doubt there might formerly have been on this point, it was fully settled by the case of *Smallman v. Agburrow* (a), which was twice argued, and where it was determined that if the husband lease for years the land of the wife rendering rent, he shall not have debt for the rent incurred after the wife's death, because his estate is determined and the reversion is gone. The case of *Brudnell v. Roberts* (b) also establishes the same doctrine. That was covenant against a lessee for years by the plaintiff as heir in reversion in fee to his father, by whom the lease was granted. The defendant pleaded that the father when he made the lease to him was only tenant for life, and having since died the lease was determined, *absque hoc* that after the making of the lease the reversion in fee belonged to the father: and on demurrer judgment was given for the defendant; for, as was said in argument and adopted by the Court, though during the father's life the lessee would have been estopped from saying that the father had not the reversion in him, yet on his death the lease was at an end, and the lessee was not estopped to plead the truth by confessing and avoiding the lease. Then as to the objections to the form of the fourth plea; it being stated affirmatively what estate the plaintiff had, it was not necessary to shew what he had not. And if the plaintiff had the reversion in fee in himself at the time, it lay upon him to reply that matter if he thought it would have availed him. It is not necessary to dispute the rule laid down in *Co. Lit.* 303. b. that estates in fee-simple may be generally alleged in pleading, but that the commencement of particular estates regularly must be shewn &c.: but that rule has always been considered as applicable only to cases where either party makes title to himself in a particular estate, or where the defendant justifies as servant to one who has such title. *Scilly v. Dally*, *Salk.* 562. *Johns v. Whitley*, 3 *Wils.* 72. But here the defendant claims no particular estate; for his estate is admitted by the plaintiff, and is the very

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(a) 1 *Roll. R.* 401. 441. and 3 *Bulstr.* 272.(b) 2 *Wils.* 143.

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foundation of his action. On the other hand he is a stranger to the origin of the plaintiff's title, and it is enough for him to shew that it has ceased. The fact of the plaintiff's wife having only a life estate in the premises might have been traversed by the plaintiff's pleading in reply a greater estate by way of inducement, and denying the estate for life. The defendant was obliged to set up the defence insisted upon in justice to himself; because, if the facts be true, a recovery by the present plaintiff would be no bar to an action by the real owner of the estate.

Abbott in reply, As to the first special plea, admitted that by the statute of *Ric. 3.* the court were bound to take notice of the interest of cestuy que trust, but referred to what was said of that statute in *Goodtitle v. Jones (a)*, that it was only intended to apply to cases where the owner in possession of an estate, having conveyed it to a trustee to his own use, and afterwards conveyed it away to a purchaser, attempted to set up the estate in his own trustee against the purchaser. [LAWRENCE J. here observed that it must not be considered from what fell from the Court that that statute only applied to the cases there mentioned; that the statute was then unexpectedly cited, and the Court feeling that it did not apply to that case threw out on the sudden what was reported to have been said; but that though it certainly did not apply to that case, on further consideration the Court were of opinion that it extended to other cases.] At any rate the argument of the plaintiff proceeds on the assumption that there is no distinction between legal and equitable estates under that statute; which is against the whole current of legal authorities. And it cannot be contended now that a person having only an equitable title in an estate can convey a legal title in it to another. What was said in the case of *Smallman v. Agburov (b)*, as to the point now in judgment, was merely an observation on the case in the *Year-Book*; for the principal question there was on the severance of a joint-tenancy. In *Brudnell v. Roberts (c)*, after the death of the tenant for life there was no person who remained bound to the lessee for the continuance of the lease, and therefore there could be no estoppel against him to avoid it, as estoppels must be mutual. The case of *Jeffrey v. Guy (d)* was only cited to shew that it did not occur either to the bar or the bench that the pleadings were erroneous, which they

(a) *Ante*, 7 vol. 51.(b) 1 *Rel. R.* 401. 441. 3 *Bulfr.* 272.(c) 2 *Wils.* 143.(d) *Yelv.* 78.

would

would have been if the issue tendered of the entry of the heir before the covenant broken had been immaterial. The opinion of Lord Holt in *Gillman v. Hoare* (a), which has been relied on, was not upon the point in judgment; for the court ultimately decided in favour of the estoppel. As to the form of the last plea, and the argument that the plaintiff should have replied a greater estate in himself if it existed than is stated in that plea; that was not necessary to be replied, because the onus lay upon the defendant to take away the right of action of the plaintiff by the strength of his own plea: and where the whole defence rests upon negating the plaintiff's right, the defendant is bound to state in precise terms every thing necessary to negative such right. The very authorities cited by the defendant's counsel shew that the rule is general, extending to every case where a particular estate is to be shewn in pleading.

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Cur. (b) adv. vult.

GROSE J. now delivered the opinion of the court. This is an action of covenant in which the plaintiff declares on a breach of covenant contained in a lease of premises for twenty-one years made by himself and his wife, in the lifetime of the wife, under which the defendant has occupied during the whole term. The breach assigned is that the defendant has not pursuant to the covenant repaired the premises which were during the term ruinous and out of repair, and were so at the expiration of it. To this the defendant has pleaded several pleas, the two first of which conclude to the country; and the question here arises on the third and fourth pleas, to which there are demurrers. The third plea states that before the date of the lease *Thomas Woodward* being seized in fee of the premises devised them to trustees and their heirs, to the use of them and their heirs, in trust that they should from time to time during the life of the wife pay the rents to her or permit her to receive them to her own use and benefit; that thereupon the husband and wife in right of the wife became entitled to the rents, and being so entitled made the indenture; that before the expiration of the lease the wife died, whereupon the said term ceased and ended; and that the premises were not out of repair during the lifetime of the wife. The causes of demurrer assigned to this plea are that it does not admit that the plaintiff or his wife had any estate in the premises at the time of the making

(a) *Salk.* 275.

(b) Lord Kenyon Ch. J. was absent, | through indisposition, on the day when this case was argued.

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of the indenture, or that any thing passed from either of them by that indenture. The fourth plea varies from the third, and states that the husband and wife in right of the wife were seized in their demesne as of freehold for her life, with the like conclusion to this plea as to the third. The cause of demurrer shewn to this plea is, that the defendant has alleged a life estate in the wife, without shewing the commencement of it; and this was the principal question we wished to look into. The general ground of demurrer on which the plaintiff proceeds as to both these pleas is that the plaintiff is estopped by the indenture from so pleading, according to the rule in *Co. Lit.* 47. *b*; to which it is answered by the defendant that according to the authority of the same book, where an interest passes, which is determined, there is no estoppel. The latter rule the counsel for the plaintiff has endeavoured to impeach. If this case stood on the third plea only, it could not be necessary to consider that question, which can only arise where it shall appear that some legal interest passed by the indenture. But according to the facts disclosed by the third plea the whole fee, both the possession and use, passed by the will of *Thomas Woodward* to the trustees who were to receive and pay the rents and profits to the wife, it being the testator's object to create a trust which should place the estate out of the control and disposition of the husband. And were it to be holden, as has been argued, that by virtue of the statute of the 1 *Ric.* 3. *c.* 1. the plaintiff could dispose of any legal interest in the estate so devised, it would in a great measure destroy that system of trusts by which real property is secured to women during their coverture free from the control of their husbands. The cases which were cited in support of this position were cases of uses which would be executed by the statute 27 *H.* 8., and do not apply to a trust such as that created in favour of the plaintiff's wife. We are therefore of opinion that this third plea is no bar to the action.

Abbott then, finding that the court were disposed to give judgment against the plaintiff on the fourth (a) plea, asked leave to amend by striking out the demurrer to that plea, and replying specially. Whereupon

The Court gave leave to amend accordingly.

(a) The court were prepared to overrule the formal as well as the substantial objections to this plea.

DOE on the several Demises of ELIZABETH SMALL,
MARIA MEACOCK, and FRANCIS MEACOCK, *against*
ANN ALLEN (a).

Wednesday
Feb. 12th.

ON the trial of this ejectment for certain messuages and lands in the several parishes of *Skeiviog Kilkerw* and *Mold* in the county of *Flint*, a special verdict was found, which stated in substance as follows.

John Williams late of *Garneddwen* in the county of *Flint* being seised in fee of the premises in question by his will duly executed and attested, dated the 20th of *March* 1762, devised as follows; "As to what real and personal estate it hath pleased Almighty God to bless me with, I give and dispose of the same as followeth; first my will is that all my debts and funeral expences be justly paid off and discharged out of my personal estate; and if the same shall fall short, I do hereby charge my real estate with the payment of the same. I do hereby give and devise all my messuages lands tenements and hereditaments whatsoever situate lying and being in the several parishes of *Skeiviog Kilkerw* and *Mold*, (all the purchased lands in the aforesaid several parishes of *Skeiviog Kilkerw* and *Mold*,) unto *William Allen* of *Skeiviog* son of *Thomas Allen* of *Skeiviog* aforesaid deceased. And I do hereby give and devise all my messuages lands tenements and hereditaments situate lying and being in the township of *Garneddwen* in the parish of *Skeiviog* aforesaid unto the aforesaid *William Allen* for and during the term of thirty years; and from and after the end of the said term I give and devise the same to my right heirs for ever. I do hereby charge all and singular the aforesaid messuages lands tenements and hereditaments with the sum of 700 *l.* in case the said *W. Allen* shall at any time hereafter be interrupted in the peaceable possession of the premises hereby demised to him to his own proper use, to be raised by sale or mortgage of the said premises. I give and bequeath unto *T. Allen*, son of *T. Allen* of *Skeiviog* aforesaid deceased, the two hunting horses called by the names of *Cricked* and *Chance* and the pack of hounds, and to be delivered to the aforesaid *Thomas Allen* immediately after my decease. And all the rest and residue of my personal estate of what nature or kind soever and wheresoever the same is

J. S. devised thus "As to what real and personal estate it has pleased God to bless me with (all my debts &c. being first paid out of my personal, and if that is not sufficient, out of my real, estate) I give and dispose of the same as follows; I devise all my messuages lands tenements and hereditaments in *S. &c* to *A.*:" held that *A.* took only a life estate.

(a) *Sup.* 147. *S. C.*

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or may be found, or wherein I have any right or title unto, I give and bequeath unto my loving friend *W. Allen*, whom I nominate and appoint to be my sole executor of this my last will and testament &c." The devisor died on the 22d of *March* 1762 seised of the tenements comprized in his said will, and also of other tenements not thereby devised; and which last mentioned tenements descended to his heir at law *Samuel Small*, who thereupon entered &c. *William Allen* also entered into possession of the said tenements so devised to him. *Samuel Small* after the testator's death paid bond debts to the amount of 700*l.* and upwards. *William Allen* afterwards, on the 18th of *February* 1793, intermarried with *Ann Allen* the defendant, and continued in possession of the devised premises in *Garneddwen* in the parish of *Skeiviog* aforesaid during the term of thirty years after the testator's death, and was seised or possessed of all the rest of the said devised premises in the several parishes of *Skeiviog Kilkew* and *Mold* in the said declaration mentioned, until the 28th of *September* 1797; when he died leaving issue by the said *Ann* one son *W. J. Allen*. By his will the said *William Allen* devised the said premises, provided he was enabled so to do, to the said *Ann* for life, with divers remainders over; whereupon the said *Ann* entered &c. *W. Allen* at the expiration of the said term of thirty years gave up to the said *Samuel Small* the possession of the tenements in the township of *Garneddwen* aforesaid. *Samuel Small* died on the 1st of *January* 1795, leaving the lessors of the plaintiff his heirs at law, who are also the heirs at law of the testator *J. Williams*. The special verdict then stated the entry and demise of the lessors of the plaintiff, and the ouster of the plaintiff &c.

Benyon for the plaintiff (a). The question is whether *William Allen* took a fee or a less estate in the premises mentioned in the first demise. If he took a fee, the defendant is entitled to the judgment of the court; if a less estate, the plaintiff is entitled to recover. In the estate of *Garneddwen W. Allen* by the express words of the will took only a term of thirty years, which is now expired. And in the other estates in the parishes of *Skeiviog Kilkew* and *Mold* he took at most (b) only an estate for life. An

(a) This case was argued on a former day in this term.

(b) The plaintiff's counsel was at first about to contend that the devisee *W. A* took only an estate for the term of thirty years in the premises first devised as well as

in those at *Garneddwen*, on the ground that they were all devised by one clause; but he immediately abandoned that argument on the court expressing a strong opinion against him upon that point.

heir at law can only be disinherited by express words or by necessary implication (a). Here there are no words of inheritance annexed to the devise to *William Allen* to carry a greater estate than for life: and the only grounds on which it can be contended that a fee passed are, 1st, on the introductory clause manifesting an intention in the devisor to dispose of all he had; 2dly, on the charge for the payment of debts by the devisee, with which he cannot comply unless he takes a fee; or 3dly, on the word *hereditaments*. 1st, It has never been holden that introductory words like those in this will are in themselves sufficient to carry a fee, unless followed by a residuary clause manifesting an intention in the devisor to leave nothing undisposed of. *Right d. Mitchell v. Sidebotham* (b), *Denn v. Gaskin* (c), *Goodright v. Stocker* (d), and *Doe v. Wright* (e). In general, such introductory words are considered to be of course, and equally pertinent whether the devisor intended to devise away all his estate or not. And here it is expressly found as a fact that he died seised of other estates not comprized in the will; which negatives his intention of disposing of all he had. As to the second ground, the distinction is this; where the charge is upon the estate generally, the devisee does not necessarily take a fee, but where it is upon the devisee himself in respect of the estate, he does: but here the charge is on the estate. [This head of argument was abandoned by the counsel for the defendant; and so was the third ground, upon the word *hereditaments* taken per se.] This case is very like the words of the devise in *Denn d. Moor v. Mellor* (f): but there the words were in the residuary clause, and there was no introductory clause. The testator there, after devising certain estates, added, "all the rest of my lands tenements and hereditaments either freehold or copyhold whatsoever and wheresoever, and also all my goods chattels and personal estate of what nature or kind soever, after payment of my just debts and funeral expences, I give devise and bequeath unto my wife; and I do hereby nominate her sole executrix" &c. The court held that the wife only took an estate for life. It may be said that the judgment of this court was afterwards reversed in the exchequer-chamber, and that it was there determined that the wife took a fee: but supposing that

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(a) *Vide* *Moone, d. Fagge v. Heafeman*,
Willes's Rep. 140, 1.

(b) *Dougl.* 759.

(c) *Corup.* 660.

(d) *Ante*, 5 vol. 13.

(e) *Ante*, 64.

(f) *Ante*, 5 vol. 558. and 6 vol. 175.

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judgment of reversal ultimately to stand, yet Lord Ch. J. *Eyre*, who delivered the reasons of the judges, did not proceed on any ground affecting the decision of this case; for he neither relied on the word hereditaments, (which indeed in *Hopewell v. Acland* (a) and in *Canning v. Canning* (b) was holden not to be sufficient to carry a fee) nor on the charge for payment of debts, but solely on the consideration that the devise was contained in the residuary clause; which of course cannot apply to this case, where the residuary clause is in terms confined to the personalty.

Manley contra. Upon the whole view of the will there was a manifest intention in the deviser to give *William Allen* a fee, and the words used are sufficient for that purpose, without relying on the word *hereditaments*; though there are some opinions in the books tending to shew that that word alone will pass a fee if such be the apparent intention of the deviser. This case is stronger for passing the fee than that of *Denn d. Moor v. Mellor* (c); because here is an introductory clause shewing an intention to dispose of all the deviser's real and personal estate, which was wanting in that case; and yet the court of exchequer chamber held that a fee there passed, on the ground of an apparent intention in the testator to dispose of all he had, though he had annexed no words of inheritance to the particular devise. In the introductory clause the word *estate* is used, which has always been holden to mean the whole interest which the deviser had in the property, unless coupled with other words denoting a local description of it. The deviser here had two sorts of property, the one a family, the other a purchased, estate: he distinguished between the two by giving the family estate away from his heir only for a limited time: but the purchased estate he thought he might properly dispose of as he pleased, and give it away altogether to the devisee whom he most favoured. But if it be decided that an estate for life only was given in this latter, this incongruous and improbable intention must be imputed to the testator, that he was less anxious to give away his acquired property than his family estate from his heir to his favourite devisee; for an estate for thirty years certain must naturally be expected to be of longer duration than an estate for life, no life being worth so many years purchase. The very circumstance of the residuary clause not mentioning the real estate shews that the deviser thought he had before given

(a) *Salk.* 239.(b) *Mosel*: 240.(c) *Ante*, 5 vol. 558. and 6 vol. 175.

the whole of his estate in the purchased lands to his devisee. This circumstance was relied on by Lord *Mansfield* in *Frogmorton v. Holyday* (a) as explanatory of such an intention in the devisor: and *Wilmot J.* there (b) relied on the introductory clause, and said it was the same as if it were repeated in every part of the will. Now if that were done in this case, the words would be fully sufficient to carry the fee in the purchased lands to *William Allen*. In *Grayson v. Atkinson* (c) the introductory clause was to the same effect as here; "as to all my temporal estate wherewith it has pleased God to bless me, I give and devise the same as follows;" then after giving several legacies and charges the will proceeds; "as to all the rest of my goods and chattels real and personal moveable and immoveable, as houses gardens tenements &c, I give to A.;" and there it was determined that A. took a fee. So in *Hogan v. Jackson* (d) the introductory clause was "as to my worldly substance;" and then the testator after making several bequests, amongst others to his mother for life, proceeded to devise to his mother "all the remainder and residue of all his effects both real and personal which he should die possessed of;" under which it was holden that the mother took a fee. So in *Tanner v. Wife* (e) the introductory words "as to all my temporal estate" &c coupled with a subsequent devise of "all the rest of my estate goods and chattels &c real and personal I give to A.," was also holden to give the fee to A. The case of *Right v. Sidebotham* (f) is very distinguishable from this; for there the testator used different words in devising the two different parts of his estate, annexing words of inheritance to the devise in one instance and not in the other, which furnished a presumption that he intended such a difference. And in regard to *Denn v. Gas-kin* (g), Lord *Mansfield* said there were no words by which he could connect the devise in question with the introductory clause, "as to all his worldly estate;" otherwise he thought it might have been sufficient to carry the fee: but here they are immediately connected.

Benyon, in reply, shewed that the cases cited of *Grayson v. Atkinson*, *Hogan v. Jackson*, and *Tanner v. Wife*, fell under the distinction he had first taken, as to where the introductory words

(a) 3 Burr. 1623.

(b) *Ib.* 1625.

(c) 1 Wils. 333.

(d) Cowp. 299.

(e) 3 P. Wms. 224.

(f) Dougl. 759.

(g) Cowp. 660.

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were followed by a residuary clause comprehending the real estate.

Lord KENYON Ch. J. Although the court are not now prepared to give their final judgment on this special verdict, I cannot forbear expressing my present sentiments on it. It has been frequently lamented that at first after the passing of the statute of wills the courts did not require the same technical expressions in a will to pass a real estate as are necessary in conveying the estate by deed; for then we should not have had more cases on the construction of wills than of deeds; and it very rarely happens now that a question arises on the construction of a limitation in a deed. There are certain received words that are well known and have from time to time been used by conveyancers in drawing deeds, and these exclude all doubt as to their legal meaning. But in expounding wills a greater latitude of construction has been allowed. After an anxious endeavour to discover the intention of a testator it frequently happens that we can only conjecture what his intention was, and sometimes there is scarcely enough even to form a conjecture. Formerly Sir *J. Bland* made his own will, and at the close of it he said that he had disposed of his estate in so clear a manner that he thought it impossible for any lawyer to doubt about it; this will was afterwards contested, and it came before Lord *Hardwicke*, who said that he was so utterly at a loss to conceive what was the real intention of the testator that he wished he could find some ground on which to form a conjecture. So in the case of *Right v. Sidebotham* Lord *Mansfield*, whose mind was as equal to the explanation of difficult points as that of any lawyer who ever sat in *Westminster-hall*, admitted the difficulty of deciding questions of this kind; saying "I verily believe that in almost every case where by law a general devise of lands is reduced to an estate for life the intent of the testator is thwarted; for ordinary people do not distinguish between real and personal property. The rule of law however is established and certain that express words of limitation or words tantamount are necessary to pass an estate of inheritance. "All my estate" or "all my interest" will do: but "all my lands lying in such a place" is not sufficient. Such words are considered merely as descriptive of the local situation, and only carry an estate for life. Nor are words tending to disinherit the heir at law sufficient to prevent his taking, unless the estate is given to somebody else. I have no doubt but the testator's intention here was to disinherit his heir at law, as in the case of *Denn*

v. *Gaskin*." And yet he was not bold enough in that case to decide that the devisee took more than an estate for life. The plaintiff's counsel in arguing this case anticipated the three grounds on which it might be contended on the part of the defendant that a fee passed by this will. The first is the introductory clause; on which the case of *Ibbetson v. Buckwith* (a) is decisive: that case was decided by a great lawyer, Lord *Talbot*, who thought that such a clause accompanied by other words in a will would pass a fee, but that that alone was not sufficient for that purpose; and this case has been followed by a variety of others to the same effect. The second ground, respecting the charge, was abandoned by the defendant's counsel; and very properly so, all the decisions on this subject being against him. A multitude of cases might be cited on this point, but I will only refer to that of *Merson v. Blackmore* (b), where the master of the Rolls said "Where a gross sum is to be paid out of the lands, to be sure it gives a fee to the devisee of those lands. But here the debts are not at all events charged upon the real estate, but only contingently, if the personal estate should not be sufficient; and therefore does not come up to the cases cited of a gross sum to be paid out of land, and consequently gives no more than an estate for life to the plaintiff, the devisee." The next point arises on the word "hereditaments;" and I am astonished that any doubt should ever have been entertained about that. It is not so strong a word as "tenement:" it is merely a description of the thing itself, and not of the quality of it, or the interest in it. If the word "estate" had been used, that would have been sufficient to have carried the fee: or if in the residuary clause there had been the word "real" as well as "personal estate," that would have been sufficient. But on the authority of all the cases (except that of *Denn v. Moor v. Mellor*) I am of opinion that the devisee took only an estate for life in the premises mentioned in the first devise. With regard to that case of *Moor v. Mellor*, not knowing distinctly the grounds upon which the judgment of this court was reversed in the exchequer chamber, I can only say that I see no reason to induce me to alter the opinion I there gave: if it shall be discovered on examining the grounds of the judgment of the court of error that that court rectified a mistake made by this court, I shall be glad that justice has been thereby done to the parties in the cause: but if that shall be found to be a single case, and that the judges in deciding it departed from

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(a) *Cas. Temp. Talb.* 157.(b) 2 *Atk.* 341.

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those rules that have guided conveyancers for ages past, then it will be most unfortunate for the public. The maxim *misera est servitus ubi jus est vagum aut incertum* applies with peculiar force to questions respecting real property. In family settlements provision is made for unborn generations; and if by the means of new lights occurring to new judges all that which was supposed to be law by the wisdom of our ancestors is to be swept away at a time when the limitations are to take effect, mischievous indeed will be the consequence to the public. It was upon this ground that the majority of the judges in the House of Lords were of opinion that the case of *Perryn v. Blake* had been wrongly decided in this court.

The three other judges said that they were of the same opinion, but wished to have an opportunity, before the case was finally determined, of looking into the case of *Denn d. Moor v. Mellor* in the exchequer chamber.

Lord KENYON Ch. J. on this day said, we have looked into the cases cited, and we all concur in the opinion given when the case was argued. We think that all the cases on this subject lead to the same conclusion, that the devisee *W. Allen* took only an estate for life under the will in question; and consequently that the plaintiff is entitled to the judgment of the court.

Judgment for the plaintiff.

THE END OF HILARY TERM.

C A S E S

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ARGUED and DETERMINED

IN THE

Court of KING'S BENCH,

IN

Easter Term,

In the Fortieth Year of the Reign of GEORGE III.

TAYLOR and Another *against* RICHARDSON.

Wednesday,
April 30th.

THE writ in this case, directed to the sheriff of *Cumberland*, was sued out on the 6th of *August* last, returnable the first return of last *Michaelmas* Term. On the 8th of *August* the plaintiffs applied to the sheriff of *Cumberland* to direct his warrant for the arrest of the defendant to *A. B.* and *C.* as special bailiffs, and the plaintiff's attorney by an indorsement on the writ undertook to indemnify the sheriff. The defendant was arrested, and gave a bail bond. On the 3d of *November* the defendant being in the said sheriff's custody at the suit of *Blackett* and others, the defendant's bail in this action gave notice to the sheriff and also to the keeper of the gaol at *Carlisle* that the defendant was rendered and did thereby render himself in *this* action, and required the keeper to detain the defendant in his custody. On the 10th of *December* the defendant was discharged out of the sheriff's custody, the plaintiffs in the other action being satisfied for their debt. In the last term the plaintiffs ruled the sheriff to return the writ, when the sheriff returned *cepi corpus*, which rule

Though the sheriff appoint special bailiffs to arrest the defendant at the plaintiff's request, the sheriff is responsible for the defendant after the arrest made.

Park now moved to discharge, on the ground that as the plaintiffs had nominated special bailiffs of their own, and had undertaken to indemnify the sheriff, they should not afterwards have ruled the sheriff to return the writ; and he referred to

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the cases of *De Moranda v. Dunkin* (a) and *Hamilton v. Dalziel* (b), where it was determined that if the sheriff appoint a special bailiff at the plaintiff's request the latter cannot rule the sheriff to return the writ; and in the last mentioned case it was also stated that in *Cumberland* there are no bond bailiffs. But

Lord KENYON Ch. J. said, This is very distinguishable from the two cases cited, where probably it was owing to the misconduct of the plaintiff himself that the sheriff did not do his duty: but here the defendant was in the custody of the sheriff in another suit, and therefore the sheriff should not have discharged him without first inquiring whether or not there were any other detainers against him. What protection the sheriff of *Cumberland* has in cases of this kind that other sheriffs have not, it is not necessary to inquire in this case: but, though he may not have bond bailiffs, he may perhaps learn, whenever the question arises, that he is bound like all other sheriffs either to execute the writ personally or to procure it to be executed by some other person, for whom he is responsible.

Per Curiam,

Rule refused.

Holroyd was to have opposed this rule in the first instance.

(a) *Ante*, 4 vol. 119.

(b) 2 *Bl. Rep.* 952.

Friday,
May 2d.

EARL FERRERS *against* HENTON.

An estate of the value of 150*l.* per annum, holden by the defendant in his own right, under a lease for 99 years to trustees if the defendant and others should so long live, is a sufficient qualification to kill game under the stat. 22 and 23 *Car.* 2, c. 25. s. 3.

THIS was an action (a) for the penalty on the statute 5 *Ann.* c. 14. for killing game, not being duly qualified. At the trial at the last assizes at *Leicester* the question turned on the defendant's qualification; as to which it appeared that he was possessed of certain premises of the yearly value of upwards of 150*l.* in his own right, under a lease granted to certain other persons named for ninety-nine years (b), if he, the defendant, and two others should so long live.

Chambre B., being of opinion that this was a sufficient qualification for the defendant to kill game, nonsuited the plaintiff.

(a) The action is given by the 8 *Geo.* 1. c. 19. and 2. *Geo.* 3. c. 19.

(b) The 22 and 23 *Car.* 2. c. 25. s. 3. enacts that "every person, not having lands and tenements or some other estate of inheritance in his own or his wife's right of the clear yearly value of 100*l.* per annum,

or for term of life, or having lease or leases of 99 years, or for any longer term, of the clear yearly value of 150*l.* &c. is thereby declared to be a person by the laws of this realm not allowed to have, &c. any guns, &c. for the taking and killing of game."

Vaughan

Vaughan Serjt. now moved to set aside the nonsuit, on the ground that the defendant's estate in the premises was not such as the statute requires for this purpose; being neither a lease for life, because the lives might survive the term; nor a lease for ninety-nine years certain, because the lives might drop before.

Lord KENYON C. J. Leases of this kind have always been deemed sufficient to give a qualification. There is no reasonable probability of any life in being extending beyond ninety-nine years: and the legislature in admitting leases for ninety-nine years of a certain value to be a qualification to kill game did not mean to require that they should positively enure so long: it is sufficient if they may extend to that period, subject as in this case to the contingency of the party's so long living.

Per Curiam.

Rule refused.

GORDON and Another, Assignees of CROSLY, a Bankrupt, *against* WILKINSON.

Saturday,
May 3d.

IN an action of trover for certain goods, which was tried before Mr. *J. Rooke* at *York*, the question turned upon the validity of the commission of bankrupt under which the plaintiffs claimed. The act of bankruptcy insisted on was the bankrupt's having lain in prison two months and upwards upon an arrest for debt; but it appeared that the two months did not expire until the 22d of *August* 1797, and the commission issued on the 28th of the preceding *June*; whereupon the plaintiffs were nonsuited.

Law now moved to set aside the nonsuit, on the authority of the case of *Hope v. Gill*, cited in *Beawes' Lex Merc.* 531. as having been adjudged by Lord *Raymond* at *Guildhall* in *M. 5 Geo. 2.*; where it was ruled that lying in prison two lunar months makes a man a bankrupt from the first arrest; and that although the commission were taken out before the two months were expired, yet it was sufficient, the bankruptcy having relation to a time before the taking out of the commission. In addition to which he stated that taking out such commissions was not an unusual practice; and therefore it was fit that the law should be settled.

Lord KENYON C. J. I cannot conceive how a commission of bankrupt can be taken out in such a case before the two months are expired; because in order to obtain it there must be an affidavit

Where a trader commits an act of bankruptcy by lying two months in prison under an arrest, tho' the act of bankruptcy when complete relates back to the arrest and first imprisonment, yet no commission can be sued out thereon till the expiration of the two months.

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made that the party has committed an act of bankruptcy. But surely in these instances though the party imprisoned be in the progressive course of committing an act of bankruptcy from the time of his first lying in prison, yet the act itself is not completed till the expiration of the two months by the very words of the act of parliament (a). The commission therefore cannot regularly issue until that time; and the Lord Chancellor if the fact were disclosed to him would most probably supercede the commission, which can only be founded on perjury. If such a practice has prevailed, it is fit that a stop should be put to it as soon as possible.

Per Curiam.

Rule refused (b).

(a) 21 Jac. 1. c. 19. s. 2.

(b) But where a trader becomes a bankrupt by lying in prison for two months, the act of bankruptcy relates back to the time

of the arrest so as to vest the property in the assignees from that period. Vide *Rose v. Green*, 1. Burr. 437; and *King* assignee of *Langman v. Leith*, ante, 2. vol. 141.

Saturday,
 May 3d.

The KING against HARRISON and Company.

A conviction on the excise laws against such an one and company cannot be supported.

A CONVICTION on the excise laws under the above title, and against persons so described, was set down for argument in the peremptory paper: but when it was called on

LORD KENYON Ch. J. said, It is impossible that a conviction of such an one *and company* can be supported. It is a mere nullity even against the party named. The Court are bound in duty to take care that summary proceedings before Magistrates are regularly conducted, whether the parties object to them or not. We cannot tell upon the face of this proceeding but that the delinquency of *Harrison's* partners, who are not before the Court, may have been imputed to him. As no action could be maintained against such an one and company without naming all the parties, so neither can a conviction be sustained in this form.

Per Curiam,

Conviction quashed.

Wood was to have argued in support of the conviction, and *Holroyd* against it.

JACKSON and Another *against* CHARNOCK.

1800.

Tuesday,
May 6th.

THIS was an action of covenant on a charter-party of affreightment of the *Britannia* on a voyage from *London* to *Madras*, and from thence to any port or ports in the *East Indies*, and back again to the port of *London*. The action was brought for 8297*l.* 12*s.* for freight, and for 1440*l.* for demurrage; and the Defendant having pleaded, the cause was tried at the sittings after last *Michaelmas* Term at *Guildhall* before Lord *Kenyon*, when the jury by consent found a verdict for the plaintiffs, damages 15,000*l.*, subject to the arbitration of three merchants as to the quantum, and the opinion of this Court as to a question of law on the following case.

The plaintiff *Jackson* was owner of the *Britannia* in 1796, and the other plaintiff *Stewart* was captain of the same. On the 19th *November* 1796 *Jackson* let to hire the ship for a voyage from *London* to *India* and back again to the Defendant, who had contracted to furnish to the *East India* Company extra ships for their trade. The ship arrived safely at *Bengal*. On the 10th of *December* 1797, after being surveyed by the *East India* Company's officers and reported sea-worthy, she left *Bengal* laden with goods by the *East India* Company, to whom the ship was let by the defendant. On the 22d of the same month it was discovered that she had sprung a leak, and which leak gained upon the ship, notwithstanding every effort of the crew to keep it under. A consultation was holden by the officers of the ship, who were unanimously of opinion that it was necessary for the common safety that the ship should be lightened as soon as possible of spare materials and part of the cargo, which were thereupon thrown overboard; and in consequence of the ship being thus lightened she arrived in *Table Bay*, at the *Cape of Good Hope*, on the 16th of *February* 1797. Immediately on her arrival at the *Cape* the ship with the concurrence and approbation of the agents for all parties was surveyed, and on that survey it was found that she could not proceed to *England* without being repaired, and that she could not be repaired without having her cargo taken out. A ship called the *Bombay Castle* was therefore hired, on board of which the cargo was placed, and the *Britannia* was thereupon repaired. The amount of the repairs and other necessary and incidental charges connected with the repairs, together with the expences of maintaining the crew, amounted to 4395*l.* 4*s.* 6*d.* As soon as possible the cargo was reshipped, and the ship proceeded with the utmost dispatch to *Saint Helena* in her

If *A.* let his ship to *B.* for a voyage, engaging to keep it in repair during the whole time, for which he is to receive freight on the return of the ship; and for the safety of the ship it becomes necessary during the voyage to put into a port to refit; the expence of refitting must be borne entirely by *A.*; and *B.* is not liable to contribute to it in proportion to his interest in the cargo, as for a general average.

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way to *England*, and after being captured and recaptured in the course of the voyage from thence to *England* she arrived safely at the port of *London* on the 5th of *October* 1798, and there landed and delivered what remained of her cargo into the Company's warehouses. "The question for the opinion of the Court arises solely on the construction of the charter-party (a), and is whether or

(a) A copy of the charter-party was annexed to the case. The following articles were those referred to in the argument: Art. 2. "The said owner and master engage and agree that the said ship is of the burthen of 384 ton at the least, and that she shall forthwith be equipped and stored in all things fit for such voyage and to the satisfaction of the said *R. Charnock*, and both at her departure outwards and homewards, and also during the whole of the said voyage, shall have a proper and sufficient quantity of ballast on board to navigate her with the utmost safety, and a sufficient quantity of dunnage to be provided at the owner's expence to preserve the cargo from damage, and shall be kept strong tight, and well and sufficiently victualled tackled and appareled, and completely furnished with all proper and necessary stores, and shall be manned &c." Art. 5th. "Upon the said ship's having completed her outward voyage and the discharge of her cargo, and having arrived at her loading port in *India*, the said *R. Charnock* or his assigns shall forthwith survey or cause the said ship to be surveyed, and such repairs fittings and things as shall on such survey be deemed necessary or proper for a homeward voyage with a cargo of *East India* or other goods shall be forthwith done supplied and furnished at the owner's expence; and so soon as the said ship shall be put in fit and proper condition for such homeward voyage, then the said *Robert Charnock* or his assigns or his or their agents or servants shall forthwith load &c. &c. but no demurrage shall in any case grow due, nor shall any lay-day be reckoned during such time as the ship is out of repair". Art. 6th. "The quantity of goods which the ship can take on board and bring home &c. and the condition of the ship as to tackel stores and repairs shall be determined by the person or persons appointed by the *E. I. Company* for such like purposes, whose opinions shall be binding and conclusive between the said parties. And the certificate of such person or persons or an authentic copy thereof shall be deemed and taken as full evidence of such opinion." Art. 7th. "The ship, as soon as

she shall have received her homeward lading and dispatches and not before, shall depart and set sail (wind and weather permitting) and shall return directly without any deviation, unavoidable dangers of the seas excepted, to the port of *London* &c. and upon such discharge being completed the said ship shall finish her intended voyage." Art. 10th. "The said *R. Charnock* and his assigns his and their agents and servants both in *England* and abroad shall have free liberty at all times during the said ship's whole intended voyage, and until her final unlading and discharge, to repair and maintain or send one person on board; and for that purpose the ship upon proper usual or known signals being made for her shall lay to, if sailing, and wait till such person or persons come onboard, and the said master shall civilly treat and entertain them with reasonable and convenient food and lodging during their stay at the owner's expence; and such person or persons shall and may take a survey of the ship and every part thereof and of her cargo ammunition furniture provisions and stores &c.; and if the said ship shall not be sufficiently victualled manned and armed, or if any thing shall be deficient wanting or amiss, the said owner or master shall from time to time upon reasonable notice given to such person or persons cause the same to be amended and supplied according to the direction of such person as aforesaid. And if upon such survey it shall be found that there is a greater quantity of goods in the said ship than she can reasonably carry in her, so as to be free and fit to sail through the seas, and capable to defend herself and let all her guns be clear, in such cases it shall be lawful for such person or persons to cause the ship to be lightened so as to reduce the cargo to such a degree as that the ship can reasonably carry the same in manner aforesaid." Art. 18th. "If any of the goods or merchandizes laden or put on board the said ship shall be lost or not delivered or shall be prejudiced wet or damaged, and if the owners shall

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or not the defendant be only liable to such general average as arises on the goods thrown over board, or also to general average on the repairs and other expences at the *Cape of Good Hope*?

Reynolds for the plaintiff. The defendant is liable to general average for the whole expences. It may be collected from all the writers on this subject that by a general average is meant a contribution to the expences that are necessarily incurred for the preservation of the ship and cargo in consequence of losses and damages accidentally happening at sea, 1 *Mag. Insur.* p. 64.; which (among others) includes all that is thrown overboard or damaged by a jettison for the ship's safety, and charges occasioned by any unavoidable accidents. Now this case comes within that definition. The damage was accidental, and the expences were necessary for the preservation of the whole concern; and then it becomes a general average. In *Da Costa v. Newnham* (a) it was holden that when a ship is obliged to put into port for the benefit of the whole concern, the charges of loading and unloading the cargo and taking care of it, and even the wages and provisions of the workmen hired for the repairs, become general average. And in that case a passage was cited from *Beawes's Lex*

(a) *Ante*, 2 vol. 407.

shall not be able to prove to the satisfaction of the said *R. Charnock* or his assigns that the said goods have been lost prejudiced wet or damaged through unavoidable accident and necessity, then it shall be deemed that the said goods have been lost or damaged through the default of the master; and in such case the owners shall pay to the said *R. Charnock* or his assigns the full prime cost of such goods lost or not delivered and an addition of 30 per cent. thereon; and if the said *R. Charnock* or his assigns shall agree to receive the damaged goods, then the owners shall make good such damage as any of the said goods may have received and lose the freight thereof; and if the said *R. Charnock* or his assigns shall refuse to receive such damaged goods, then the owners shall take the same to their own use and pay to the said *R. Charnock* or his assigns the full invoice price thereof, and all charges customs and duties in respect thereof, and 30 per cent. upon such price charges customs and duties besides losing the freight of the said goods; but if the owners shall be able to prove to the satisfaction of the

said *R. Charnock* or his assigns, that the said goods have been lost or damaged through unavoidable accident and necessity, then and in such case they shall suffer no loss, except the freight and their proportion of a general average, in respect of any goods that may necessarily perish or be cast overboard for preservation of ship or cargo; nor shall the owners in any case be chargeable with any sum of money in respect of loss or damage exceeding the amount of 5*l.* a ton, on the ships registered burthen; and all payments in respect of loss or damages on the outward cargo shall be made in *London* and not in *India*, and that notwithstanding the said ship should happen to be lost or never arrive at *London*." Art. 22d. "If the ship shall happen to be lost before her discharge and the final delivery of her homeward cargo, the said *R. Charnock* or his assigns shall not be liable to pay any freight or demurrage for the ship or her cargo, but it shall and may be lawful to and for the owners notwithstanding to retain the said imprest-money for their own use."

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Mercatoria to shew that when a ship is forced by a storm to enter a port to repair the damage she has sustained, if she cannot continue her voyage without an apparent risk of being lost, the wages and victuals of the crew are brought into an average with all the charges of loading unloading anchorage pilotage and every other expence incurred by the necessity. Then on whom is this general contribution to be levied? Justice and law require that the expences should be borne by all who are benefited by that which removes the danger, in proportion to their respective interests; by the owners of the ship, of the freight, and of the cargo. Here the defendant is interested in the cargo, and therefore is liable in proportion to his interest. It is no answer on the part of the defendant to say that by the 18th Article of the charter-party he is made expressly liable to a general average in one instance, as furnishing a presumptive argument that he is not liable in any other; because the defendant, being liable to general average both on principle and authority, should have introduced in the charter-party an exemption from the general average in this instance if he had intended to be exempted. In *Hotbam v. The East India Company* (a), Lord Mansfield said the owners were not to pay for the damage occasioned by the storm, the act of God: but this is an attempt to make them liable, and to turn them into insurers as well as owners. If the defendant be not liable to contribute on account of the cargo, the whole expence will fall on the plaintiff, who will not be able to recover it from the underwriters, not being interested in the cargo.

Rous for the defendant. If it were material to the interest of the defendant, it might be contended that the facts here stated do not bring this case within the principle relied upon by the plaintiff's counsel, for it does not appear that the damage to the ship was occasioned by a storm. But it is not necessary now to consider what is the common rule respecting general average, since this case must depend on the particular contract between these parties, by referring to which it will appear that the defendant is not liable to general average. This is not a general charter-party of affreightment, where the interests of several persons are trusted to one; but it is a contract by which one person let his ship to another for a certain price to be paid on certain events, and by the terms of which every kind of repair is to be made by the owner. By the second Article the owners engaged that the ship should be

(a) *Dougl.* 278.

"in all things fit for the voyage both at her departure outwards and homewards, and also *during the whole of the voyage*" &c. By the fifth, the defendant was to have the ship surveyed in *India* previous to her return, and the repairs proper for the homeward voyage were to be done "at the owners' expence". And by the 22d Article the defendant was not to pay freight until the final delivery of the homeward cargo, even though the ship were lost. From every part of the contract it may be collected that it was the intention of these parties that no freight was to be paid unless the ship returned in safety, and that all expences of repairs were to be borne by the owners. The only exception is that mentioned in the 18th Article, by which it is provided that in the event of the goods being lost or damaged by unavoidable accident and necessity "the owners should suffer no loss, except the freight and their proportion of a general average in respect of any goods that might necessarily perish or be cast overboard for the preservation of the ship or cargo." But it appears that these expences were incurred in order to enable the plaintiffs to perform their part of the contract, without which they would not have been entitled to any thing; and therefore there is no ground for their calling on the defendant to contribute any proportion towards the repairs and other expences at the *Cape of Good Hope*.

Reynolds in reply. Although it is not expressly found as a fact that this damage was occasioned by a storm, it evidently appears that it was by an unavoidable accident, which brings the case within the rule of general average. According to the defendant's argument no question respecting general average would ever arise. The contracting parties usually provide for ordinary cases, as in this instance, but such contracts not applying to extraordinary cases the common rule respecting general average must attach here.

Lord KENYON Ch. J. The meaning of a general average has for a long time been well understood in the commercial world: if in the hour of danger masts are cut away or goods are thrown overboard, those who are benefited by the preservation of the ship are to contribute to the general loss thereby sustained in proportion to their respective interests. But in this case we are delivered from all consideration respecting a general average, because we are called upon to decide on the particular stipulations contained in this charter-party. Without repeating the different passages selected by the defendant's counsel, I am satisfied that the intention of the

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parties, as it is to be collected from the whole instrument, was that the ship was to be kept in repair, and that every thing that was necessary to enable the ship to perform her voyage was to be provided by the owners of the ship. Therefore I think that the expences that were incurred at the *Cape of Good Hope*, in order to put the ship in a condition to complete her voyage, ought to be borne by the plaintiffs.

GROSE J. The only question for our consideration is that which is stated at the conclusion of the case, on the true construction of this charterparty. It is not necessary to go through all the different articles that have been alluded to; it seems to me that the second is a guide for us in construing this instrument; for by that it was agreed that the ship should at the expence of the owners be kept strong and tight during the whole of the voyage. The other articles also shew that it was the intention of the parties that the defendant should not bear any part of the expence of keeping the ship in repair.

LAWRENCE J. This is not a question of general average, but on the construction of this charter-party, namely, whether or not all the damages done to the ship during the whole voyage were to be repaired by the owners; and on this question the second, tenth, and twenty-second, articles seem decisive against the plaintiffs. By the second it was stipulated that the vessel should "at her departure outwards and homewards, and also during the whole of the said voyage," be kept strong and tight, "at the owners' expence." By the tenth it is particularly provided that the defendant might at any time during the voyage survey the ship; and if any thing were wanting or deficient the owners would supply it. Now on her arrival at the *Cape of Good Hope* something was wanting, and therefore that should have been supplied at the expence of the owners. The eighteenth article also affords a strong argument against the plaintiffs: by that the parties agreed that in case any of the goods should be thrown overboard for the preservation of the ship or cargo the defendant should contribute his proportion of a general average in respect of such goods; and that shews that he was not to be liable to general average in other cases.

LE BLANC J. This question depends entirely on the construction of the contract: by that the ship owners engaged that they would at their expence keep the vessel in a proper state of repair during the whole voyage, in consideration of which they were to receive freight on the ship's return. In the course of the voyage certain expences were incurred in repairing the ship, and the ship

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having been repaired the plaintiffs were enabled to bring home the cargo, without which they would not have been entitled to their freight; these expences therefore cannot be thrown on the defendant, but must be borne by the plaintiffs who undertook to do the repairs. This cannot be considered as a case of general average.

Postea to the plaintiffs, subject as above; and the defendant not to bear any part of the expences incurred at the *Cape of Good Hope*.

HAWORTH *against* SPRAGGS.

1800.
JACKSON,
against
CHARNOCK.

Friday,
May 9th.

THE defendant was sued in an action of assumpsit by the name of *John Spraggs*; to which he pleaded in abatement as follows; “and *HE against whom the plaintiff hath exhibited his bill by the name of John Spraggs* in his proper person comes and pleads that he was baptized by the name of *James*, to wit at &c, and by the christian name of *James* hath always since his baptism hitherto been called and known, &c;” traversing in the usual form that he was ever known by the christian name of *John*. The plaintiff demurred; and assigned for special causes that by the manner of pleading the said *James* had by his said plea admitted himself to be the person named the defendant in and by the aforesaid bill of the plaintiff, and also that the said *James* had not begun his said plea in the words following, viz. “and *James Spraggs against whom*” &c. in the usual and known mode of pleading a plea of misnomer in abatement, &c.

The defendant in a plea in abatement of misnomer must give his surname as well as his true christian name, although his true surname be used in the declaration.

Manley, in support of the demurrer, referred to the cases of *Hixon v. Binns* (a), and *Roberts v. Moon* (b), to shew that the Court held a strict hand over dilatory pleas, and would not admit of a departure from the usual form of pleading in these cases. In the latter case a plea in abatement of misnomer beginning “and the said *Richard* sued by the name of *Robert*” &c. was holden bad, being an admission that he was the person named defendant by the plaintiff’s bill; so here the word *he* is equivalent to *said* in that case, and must have the same construction.

Reader, contra, denied that it had ever been decided that such a plea must be penned in any particular form of words. It was sufficient here that the defendant shewed by his plea that his

(a) *Ante*, 3 vol. 195. (b) *Ante*, 5 vol. 487.

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christian name had been mistaken by the plaintiff, admitting himself to have been properly called by his surname. But

The Court said that at any rate the plea was defective, in not setting out the surname as well as the christian name of the defendant. That such a plea must inform the plaintiff what is the true name of the defendant: whereas here the defendant corrected the plaintiff's mistake as to his christian name, but neither admitted that he was rightly designated by his surname, nor called himself by any other surname.

Judgment, respondeat ouster.

Friday,
May 9th.

ALPASS *against* WATKINS.

Under a limitation in a marriage settlement to the husband for life, then to the wife for life, then to the heirs of the body of the wife and their heirs, the wife took an estate tail. — And tho' it was recited in the deed that the husband's father conveyed in consideration of the marriage and "for settling and establishing the lands, &c. to the uses thereafter expressed," and subsequent uses were added in the deed, this Court would only take notice of the legal estate; — and the husband and wife having levied a fine, and having agreed to sell the estate to a purchaser from whom they had received part of the purchase money, this Court would not permit the purchaser to recover back the deposit money in an action for money had and received.

THIS was an action for money had and received by the defendant to the use of the plaintiff, brought to recover back 50*l.*, being the deposit money paid by the plaintiff to the defendant in part of 925 *l.*, the purchase money contracted for between them of a messuage called *Perry Grove* and certain lands situate in the parish of *Newland* in the county of *Gloucester*. On the trial at the sittings after last *Hilary Term* in *London* the following case was reserved for the opinion of this Court.

The estate in question was put up to sale by auction on the 9th of *June* 1797; the plaintiff was declared the purchaser in fee thereof at 925 *l.*, and paid a deposit of 50*l.* to the defendant on account of such purchase. The defendant's title to the premises sold is as follows; *John Watkins* the elder, father of the defendant, being seised in fee of the said premises, by indentures of lease and release on the 3d and 4th of *June* 1754, (being a settlement made on the marriage of his son *John Watkins*, the defendant, with *Susannah Stephens*,) in consideration of the marriage and of 200 *l.* paid to *John Watkins* the defendant as his intended wife's marriage portion and for a competent settlement and other provision to be made for the said *Susannah* in case the marriage should take effect and she should survive her intended husband, and also in consideration of the great and natural love and affection which *John Watkins* the elder had unto *J. Watkins* the younger his son and for his advancement and better preferment in life, and for the settling conveying establishing and assuring of all and singular the messuage or tenement lands and hereditaments therein after more

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particularly mentioned and described and thereby intended to be settled to the several uses intents and purposes thereafter expressed and declared, conveyed the premises above mentioned to the following uses; to the use of the said *J. Watkins* the elder for life, without impeachment of waste, remainder to the use of *Mary* the then wife of said *J. Watkins* the elder for life; remainder to the use of the said *John Watkins* the younger (the defendant) for life, without impeachment of waste, remainder to the use of the said *Susannah Stephens* the intended wife of *J. Watkins* (the defendant) for her life, for her jointure and in satisfaction of dower; and from and after the several deceases of *J. Watkins* the defendant, and of *Susannah* his intended wife and the survivor of them, then to the use and behoof of the heirs of the body of the said *Susannah Stephens* by him the said *John Watkins* the younger lawfully to be begotten and of their heirs and assigns for ever; and for default of such issue, to the use of the right heirs of *J. Watkins* the younger (the defendant) for ever. The marriage took effect; and there are issue of the marriage now living, two sons and several daughters. *John Watkins* the elder and *Mary* his wife being both dead, *John Watkins* the younger (the defendant) and *Susannah* his wife in *Easter Term 1797* levied a fine sur conuzance de droit come ceo, &c. with proclamations of the said settled premises. By an indenture dated the 11th of *April 1797* duly executed by *J. Watkins* the defendant and *Susannah* his wife the uses of such fine were declared to be, to the use of such person or persons for such estate and estates as the said *J. Watkins* the defendant and *Susannah* his wife should at any time during their joint lives by any deed or writing by them executed in the presence of two or more witnesses direct or appoint, and in default thereof to the use of *J. Watkins* the defendant and *Susannah* his wife during their lives and the life of the survivor of them; remainder to *John Watkins* the defendant in fee. The question for the opinion of the Court is, whether the defendant *J. Watkins* and *Susannah* his wife or either of them are seised of such an estate in the said premises, or have such power of appointment as will enable them to convey the same to the plaintiff in fee? If they or either of them are so seised, or have such power, then a verdict is to be entered for the defendant; if otherwise, a verdict for 50*l.* is to be entered for the plaintiff.

Holroyd for the plaintiff. Although it must be admitted that *S. Stephens* took a legal estate-tail under the marriage-settlement in

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1754, yet as it appears by a recital in that deed that it was made "for the settling conveying and assuring of the said premises to the several uses thereafter expressed," a court of equity would give relief to the parties claiming under the subsequent limitations. *Doran v. Ross*, 3 Bro. Ch. Caf. 27, 8. Therefore though the defendant could convey a legal title in the premises in question, yet as that legal title would be moulded in equity to answer all the purposes of the marriage-settlement, and as the plaintiff would take this title with notice of that defect, the defendant is not in a situation to complete what he engaged to do, namely, to make a perfect title to the plaintiff. And as the action for money had and received is founded on equitable principles, this Court should take into their consideration the equitable part of the case.

LORD KENYON Ch. J. (stopping *Walton*, who was to have argued for the defendant) Sitting in a court of law we cannot take notice of an equitable title; and that the defendant could make a good legal title cannot be doubted. The plaintiff's counsel seems to have admitted that; and if any authority were wanting to support that position, I would refer to the case of *Morris v. Ward* and others; and as my note of that case, which I had from Mr. *Filmer*, is more full than any of the printed accounts (a) of it, I will read it. It is as follows:—"Thomas Wardell seised in fee had issue a daughter named *Lucretia*, and by his will 20th of February 1682 devised thus; 'I give and bequeath unto my daughter *Lucretia* wife of *G. Andrews* all my plantation together with the negroes &c, charged &c, during the natural life of my said daughter; Item I bequeath to the heirs of the body of my said daughter *Lucretia* begotten or to be begotten and to his or her heirs for ever, after my said daughter's decease, all my before-named plantation &c, but for want of such heirs of the body of my said daughter I also give and bequeath the aforesaid premises after the decease of my said daughter to my own next heirs and their heirs for ever." The reasons of the counsel in the printed case;—It is a general rule of law that when an estate is limited to one for life, a limitation afterwards to the heirs of the body of that same person creates an estate-tail; and though this be in the case of a will, there is no reason to depart from that rule; for if *Lucretia* were construed to have an estate for life only, then the remainder "to the heirs of her body" would be words of purchase, and then

(a) Vide *Fearn's Cont. Rem.* 247. 4th ed.; 2 *Atk.* 249; and 2 *Burr.* 1102.

though she had had several sons, yet the eldest only would have been heir, and the younger sons would never have taken under that limitation, though it was clearly the testator's intention that all her sons should take by his using the word "heirs" in the plural number. And the subsequent clause "for want of such heirs of the body of my said daughter to my own next heirs and their heirs for ever" is a further explanation of his meaning, that his daughter should take an estate-tail, with a remainder to his own right heirs. — Signed, *N. Fazakerly*; *D. Ryder*. — This was heard before the Privy Council, 18th March 1730, when it was ruled that *Lucretia* took an estate-tail. The Chief Justices *Raymond* and *Eyre* assisted at the decision. *Richard Morris* appellant v. *J. Ward* and others respondents, from *Barbadoes*. — Judgment affirmed." — Though the above were only the reasons of the counsel in that case, they contain as much good sense and sound law as if they had had the authority of all the judges of *England*. And that was a stronger case than the present; for there the question arose on a will, and in order to effectuate the intention of a devisor a greater latitude of construction is allowed by the courts than in the construction of deeds. But this is the case of a deed; a deed to uses, which must be construed like a common law-conveyance. And there is no case from *Shelley's* case down to the present time in which it has not been holden that words in a deed, similar to those in this deed, did not create an estate-tail. If we were to determine otherwise, we should entrench on established rules of law, and we should defeat the intention of the parties in this and almost every other case. Cross remainders could not be raised. The consequences of a contrary decision were well explained by Lord Ch. J. *Wilmot* in the case of *Roe d. Dodson v. Grew* (a). I am therefore clearly of opinion that, sitting in a court of law, we cannot do otherwise than determine that as *S. Stephens* took an estate-tail under this settlement, and as she and her husband have levied a fine, the defendant may make a good legal title to the plaintiff, and consequently is not liable to repay the deposit-money for which this action is brought.

Per Curiam,

Postea to the defendant.

(b) 2 Will. 322.

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ALPASE
against
WATKINS.

1800.

Monday,
May 12th.CASS and Another *against* LEVY.

In an affidavit to hold to bail made by the plaintiff's clerk (the plaintiff himself residing in England) it is not sufficient to negative a tender of the debt in Bank notes "to the knowledge and belief of the clerk."

THE defendant having been holden to bail on an affidavit made by a clerk of the plaintiffs', stating that "the defendant was indebted to the plaintiffs in 325 l. and upwards for goods sold and delivered by the plaintiffs to the defendant, and that no offer had been made *to the knowledge or belief of the deponent* to pay the plaintiffs or either of them the said sum of money or any part thereof in notes of the Governor and Company of the Bank of England" &c,

Wigley moved on a former day in this term for a rule to shew cause why common bail should not be accepted.

Marryat, who now shewed cause against the rule, relied on the case of *Creswell v. Lovell* (a), where it was ruled that the defendant was properly holden to bail on an affidavit made by a co-affignee, who positively negatived any tender of the debt to himself in Bank-notes or to the other parties interested *to the best of his knowledge and belief*. But

LORD KENYON Ch. J. said, in that case the affidavit to hold to bail was made by one of the parties interested, whereas here the affidavit was made only by a clerk of the plaintiffs, the plaintiffs themselves residing in this country (b); and consistently with the truth of this affidavit the defendant may have made a tender of the debt to either of the plaintiffs.

Per Curiam,

Rule absolute.

(a) *Ante*, 418.

(b) *Vide Munro v. Spinks, ante*, 284.

Monday,
May 12th.WATSON *against* M'CULLUM.

The Court will not make a submission to an award a rule of Court, where part of the matter agreed to be referred has been made the subject of an indictment.

THE plaintiff having preferred an indictment against the defendant at the quarter-sessions for an assault, the parties agreed to refer all matters in dispute between them, and entered into general bonds of arbitration, in which it was agreed that their submission should be made a rule of this Court. And now

Lawes moved to make such submission a rule of Court: but

The Court thought that such a reference could not comprehend the subject matter of the indictment, so as to be made a rule of Court; and that the words "controversies suits or quarrels" in the

statute

statute 9 & 10 W. 3. c. 15. meant only civil disputes between the parties. Therefore they

Refused the rule.

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M'CUL-
LUM.

NUNN and LADBROOKE, Assignees of WILLIAM WILSMORE, a Bankrupt, against MARY WILSMORE, Executrix of THOMAS WILSMORE.

Tuesday,
May 13th.

ASSUMPSIT for money had and received by the defendant's testator (in one count) to the use of the Plaintiff *Nunn* and one *William Peart* a former assignee since deceased, and in whose stead the plaintiff *Ladbroke* was afterwards appointed, and (in another count) to the use of the present assignees; and also upon an account stated with *Nunn* and *Peart*. The defendant pleaded 1st, Non-assumpsit; 2dly, The Statute of Limitations; and 3dly, Plenè administravit; on which issues were joined. At the trial before *Buller J.* at the last assizes for *Essex* a verdict was taken for the Plaintiffs for 157*l.* 11*s.* subject to the opinion of this Court on the following case.

The Bankrupt *W. Wilsmore*, being a trader within the bankrupt laws, and indebted to his brother *Thomas* the defendant's deceased husband in 300*l.*, and to *Samuel Bullock* in 130*l.*, made a bill of sale of his effects dated the 20th of *July* 1792, as a security for those debts. The effects thus assigned were thereupon sold by *Bullock* who retained his own debt out of the produce, and in *November* 1792 paid over the remainder, (being the money for which the action was brought,) to *T. Wilsmore* on account of his debt. *T. Wilsmore* had received a fortune of about 1800*l.* with the defendant his wife, (his own property having been about 200*l.* only) but being a man of dissipated and unsettled turn had contracted a number of debts. In *September* 1793 he and the defendant agreed to separate upon the terms mentioned in the following indenture which was executed on the day it bears date; and the sum of 200*l.* therein mentioned was then advanced to him by *W. Harvey* one of the trustees. By indenture dated the 1st of *October* 1793 between *Thomas Wilsmore* of the 1st part, *Mary* the wife of said *Wilsmore* of the 2d part, (the defendant in the present action,) and *W. Harvey*

A deed of trust conveyed the lease of a farm and all the grantor's effects and all debts due to him to trustees in consideration of a certain sum to be paid to him by one of the trustees, in trust to dispose of all the property, and out of the produce to reimburse the trustee the sum advanced by him to the grantor, and all other the trustee's demands upon him, and then to pay all such debts as were justly due from the grantor as the trustees in their discretion should think proper, the surplus to be holden for the benefit of the grantor's wife (whose property the bulk of it originally was) as a separate maintenance

for her in consequence of a separation between them on account of her husband's ill usage: Held that such deed was not fraudulent or void as against creditors, it appearing to have been made bonâ fide at the time, and that all the creditors of the grantor known at the time had upon application to the trustees received payment of their debts: Held also that the wife was not liable as executrix de son tort after the death of her husband intestate, on account of her possession of this property under the deed of trust.

See M.
Roberts
Great
of 27. Eliz. concern
man. Conv. Bill
the preface. See
also 2. Part 316.

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of *Peldon Fanner*, and *T. Wilsmore* the elder of *Higham* in *Suffolk*, of the 3d part, after reciting that the defendant had been ill treated by her husband, and that in order to put an end to their differences, and that the said *T. Wilsmore* the younger might no longer ill treat his wife, and in order to make some provision and maintenance for her, the said *T. Wilsmore* proposed that on being paid the sum of 200*l.* for his own separate use he would quit his farm called *Pelton Lodge* in *Pelton* aforesaid and assign and transfer his farming stock, cattle, corn, &c, household goods and furniture, and also all his right and interest in the lease of the said farm and the effects thereon, and all debts due to him, unto *W. Harvey* and *T. Wilsmore* the elder their executors, &c., and not afterwards come near molest or interrupt his wife or the said trustees on any pretence whatsoever, and also reciting that *Mary Wilsmore* and *T. Wilsmore* the elder had besought *W. Harvey* to advance unto *T. Wilsmore* the younger the said sum of 200*l.*, which he had consented to do upon his giving a bond and the security of the deed, It was witnessed that in consideration of the agreement and 200*l.* to *T. Wilsmore* the younger in hand lent and paid by *W. Harvey* at or before his sealing and delivery thereof, *T. Wilsmore* the younger did assign transfer and set over unto *W. Harvey* and *T. Wilsmore* the elder all and singular the farming stock cattle corn, &c. household goods and furniture goods chattels and effects whatsoever of him *T. Wilsmore* the younger then upon or belonging to the said farm called *Peldon Lodge*, or wherever else the same or any part thereof were or should be, together with his right and interest in and to the lease of the said farm, and all such debts as were then due and owing to him; To hold unto *W. Harvey* and *T. Wilsmore* the elder their executors &c. upon trust that they (the trustees) should carry on the farming business, if they should think fit, or otherwise sell and dispose of the said goods and effects for the best price &c., and get in the debts &c., and with the money arising thereby after deducting the expences of sale &c., upon trust that *Harvey* should out of the first monies arising by any of the ways or means aforesaid reimburse himself as well the said 200*l.* then advanced to *T. Wilsmore* as aforesaid, as also such other sums as were due and owing to *Harvey* from *T. Wilsmore* the younger; and upon further trust that they (the trustees) out of the produce of the farming business or out of the monies arising by such sale or debts should pay and discharge all or such part or parts of the debts as were justly due and owing from him the said *W. Wilsmore* the younger,

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and

and which he had given an account of as they *W. Harvey* and *T. Wilsmore* the elder should in their discretion think proper; and upon further trust that the trustees should pay and apply the overplus arising from the carrying on and managing of the said farm and business, or by such sale as aforesaid of the effects and of the said debts so to be received as aforesaid, unto the said *Mary Wilsmore* to and for her sole and separate use benefit and disposal, and with which *T. Wilsmore* the younger should in no wise intermeddle. Then followed a power of attorney from *Wilsmore* the younger to collect the debts then due to him; and a covenant to leave the said farm, and not to intermeddle therewith or to molest the defendant or the trustees.—In pursuance of this deed the defendant's husband left the farm (though he returned and was received by the defendant as a visitor there for a short time in the following summer); enlisted himself as a soldier, and died in the latter end of the year 1794 intestate; the defendant being sued as executrix de son tort. The trustees entered upon their trust immediately after the execution of the above deed, employed an auctioneer, and had the effects valued and put up to public auction in *March* 1794; and paid the expences of sale, duty, &c. No such account of the debts due from the testator having been given to the trustees as mentioned in the deed, they on the 10th of *April* 1794 advertised in the *Chelmsford Chronicle* for all his creditors to meet, that his debts might be discharged; and they paid all such creditors as sent in their demands 20s. in the pound; after which there remained a balance of 329*l.* 19*s.* 1*d.* exclusive of the value of the lease and certain articles of household furniture and stock to the amount of 111*l.* bought in by one of the trustees at the auction, though not paid for; and which remained in the defendant's possession on the farm at the time of the husband's death and also at the commencement of this action. The lease, which was of the value of about 500*l.* had been granted to the deceased *T. Wilsmore* jointly with his father, the trustee, and it contained the usual covenant and proviso against assignment. The defendant's husband alone stocked and carried on the farm until the deed of separation. The defendant has constantly resided on the farm since, and received the benefit of carrying on the same, by the produce thereof being from time to time paid over to her by the trustees. On the 23d of *November* 1793 a commission of bankrupt issued against *W. Wilsmore*, founded on an act of bankruptcy committed previous to the bill of sale to *Bullock* and *Thomas Wilsmore* on a proper petitioning creditor's debt

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debt to support the commission. The plaintiff *Nunn* and the deceased *W. Peart* were duly chosen assignees under the commission upon the 21st of December 1793; and after the death of *Peart*, which happened about the year 1797, the plaintiff *Ladbroke* was duly appointed co-assignee with the other plaintiff in his place, and the usual assignment was executed to them upon the 12th of August 1798. The defendant in a conversation she had with *Bullock* about the money received under the bill of sale whilst her husband was living absent from her under the deed of separation, and soon after the issuing of the commission, said, "now we shall have to pay this money again;" And, in another conversation about the time of the second assignment under the commission, she said, "after all the affairs were settled there would be clear 300*l.* or 400*l.* to spare, exclusive of the value of the lease." The writ in this cause was issued on the 27th of May 1799. The question for the opinion of the Court, is, Whether under the circumstances of this case the plaintiffs are entitled to recover? If the Court are of opinion that they are, then the verdict to stand, otherwise a nonsuit to be entered.

Marryat for the plaintiff. Two questions arise on this case; The first upon the plea of *plenè administravit*; The other upon the Statute of Limitations. 1st, Upon these pleadings the defendant admits herself to be executrix, and only tenders issue upon the amount of assets. But the question will be, whether her possession of the property under the deed of trust set out in the case will excuse her from being liable at all events as executrix *de son tort*. Unless that deed were valid, it will be sufficient in order to charge the defendant in that character to shew that she was in possession of the intestate's property after his decease; and whether that possession were in her own right or as servant to the trustees is immaterial, according to *Padget v. Priest and Porter* (a); though it sufficiently appears that she was beneficially interested, and that the trust was created principally on her account. Now the deed was void at the time on the ground of it's being fraudulent against creditors as well at common law as under the statute 13 *Eliz. c. 5. s. 2*. That statute enacts that "every grant alienation &c. of lands goods and chattels, or of any lease &c., with intent or purpose to delay hinder or defraud creditors &c. shall be deemed and taken only as against the persons hindered delayed and defrauded by such fraudulent devises and practices to be utterly void." The provisi-

(a) *Ante*, 2 vol. 97.

ons of that statute are nearly the same as those of the 1 Jac. 1. c. 15. §. 5. respecting the avoiding of such conveyances made by bankrupts. It avoids all voluntary transfers of his property unless for a valuable consideration, or on the marriage of his children. Now this was a voluntary assignment by the intestate of all his property, even including his debts, to the trustees; and the consideration of 200*l.* therein stated to have been paid to him by one of those trustees was very inadequate to the value of the property conveyed. It is true that in the trust deed a provision is apparently made for creditors, but that was fraudulent and colourable on the face of it; for it only provided absolutely for payment of the demands of *Harvey* one of the trustees; and as to all other creditors, it was discretionary in the trustees whether or not they would pay them; for they were only to pay all or *such parts* of the debts of the intestate as they *in their discretion should think proper*; and the overplus was to be holden in trust for the wife. The effect of this deed was to hinder or delay all those creditors whom the trustees might not think proper to pay, or did not in fact pay, and to change their remedy against the intestate's effects; and it now appears that in fact it has operated to the delay of the plaintiffs whose right accrued by relation of law prior to the bill of sale to the defendant's husband, although they were not in a capacity to enforce it till afterwards. In *Hungerford v. Earle* (a), where a father made a voluntary settlement to trustees to raise money to pay his debts therein mentioned and portions for his younger children, reserving 50*l.* per annum to himself for life, with remainders over to his family, it was deemed fraudulent and void even as against creditors who became such several years after the settlement (b). There is no difference in principle whether the reservation be in favour of the party himself as well as his family, or of any part of his family alone. As to the second question on the plea of the Statute of Limitations; by the 21 Jac. 1. c. 16. §. 3. the action must be commenced within six years next after the cause of action. It must be admitted that the time is to be computed from the period when any persons whom these plaintiffs represent had a right of action; but that cannot refer back further than to the original appointment of the assignees under the commission against *W. Wilsmore*; for as against him the bill of sale from him to his brother and *Bullock* was binding, and the assignees under

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(a) 2 Vern. 261.
settlement made.

(b) In that case the parties continued in possession after the

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his commission had for the first time the power of disputing the validity of that bill of sale, and of maintaining an action to recover the value of the property so disposed of; and six years had not elapsed between their appointment and the time of suing out the writ in this case. It is true that the right of the assignees when appointed relates back to the time of the act of bankruptcy committed, which in this case is more than the six years; but that relation only takes place so as to avoid mesne acts of the bankrupt, but not so as to put them in possession of his property or to enable them to sue for it until their actual appointment as such assignees. *Kiggil v. Player*, Salk. 111. Neither was there any right of action at all until *W. Wilsmore* was declared a bankrupt; for the bankruptcy alone disaffirmed the bill of sale; and until the assignment under the commission the property was not transferred out of the bankrupt. *Cary v. Crispe*, Salk. 108. So where one received the money of an intestate after his death, and being sued by the administratrix pleaded the Statute of Limitations, it was holden that the cause of action did not accrue until the letters of administration were granted; from which time the six years were to be reckoned, and not from the receipt of the money. *Cary and Wife v. Stephenson*, Salk. 421. *Skin.* 555. and *Carth.* 335. It is true that that case finally went off on another ground; but the same point in principle was adjudged in *Sanford's* case (a) there cited, which was a case on the Statute of Fines; where one, who had a future interest, but no present right of entry at the time of the fine levied, died, and the five years passed, and afterwards administration was granted; and it was ruled that the administrator should have five years to sue from the granting of the letters of administration, for none had title of entry before. But at any rate this case is taken out of the Statute of Limitations by the advertisement of the trustees in 1794 for all the creditors to come in and have their debts discharged, and also by the conversations of the defendant with *Bullock* after November 1793 and in August 1798, the writ on which this action was commenced having been sued out in May 1799.

Larwes for the defendant. As to the first question, on the validity of the deed of trust, there was neither fraud in fact nor in law in the execution of it. It does not appear but that *Thomas Wilsmore* was possessed of sufficient property at the time to discharge all his debts; nor does it appear that any creditor who applied was

(a) Cited in *Saffyn's* case, *Cro. Jac.* 61. and 5 *Co.* 123.

refused

refused payment by the trustees: but it does appear that they advertised for all claimants to come in, and that such as did so received 20 s. in the pound. The latter part of the clause, giving discretion to the trustees to pay only such parts of the debts as they in their discretion should think proper, was meant only to enable them to discriminate between such parts as they thought just and such as were otherwise, according to the first part of the clause. There was a good consideration for the deed moving from one of the trustees, viz. 200 l. which was the full amount of the husband's capital at the time of his marriage; and the trustees after paying the debts were to stand seised of the surplus to the use of the wife to whom the bulk of the fortune originally belonged, and who was driven to seek a separate maintenance from her husband on account of his ill-usage of her. The conduct of the trustees and of the defendant was consistent with the terms of the deed; for the trustees took possession of the property, and have always retained it separate from the control of the husband; so that they have not permitted him to gain a false credit with the world in respect of the possession of this property, upon which distinction many of the cases have turned, and which, where it has been proved to have happened, has always been considered as a badge of fraud. If then the intention of the parties to the deed were fair at the time, and in fact no existing creditor were hindered or delayed, it is not competent to any person who was not a creditor at the time to object to it now. And it would be new in principle and in practice to decide that a deed which was fair and just at the time should afterwards become fraudulent and void by a legal relation back from a subsequent period. But, secondly, if by relation of law the plaintiffs were to be considered as creditors at the time of the deed, so as to avoid it for their benefit, the relation must also bind them in all other respects; and then the Statute of Limitations will operate as a bar to their recovery in this action. The right of action must be coeval with the assumpsit which the law raises; for the law does not give a right without a remedy. It is admitted that the case of *Cary and wife v. Stephenson* (a) was not ultimately decided on that point. The question there was not on the non-assumpsit *infra sex annos*, but upon the special matter replied, which the Court held defective; and so (says the Report) the case went off. And *Sanford's* (b) case was a decision upon another statute. Then as to the express pro-

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(a) *Salk.* 421. *Skin.* 555. and *Carth.* 335. (b) *Vide Cro. Jac.* 61. and 5 *Co.* 123.

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mise relied on here to take the case out of the Statute of Limitations; that is evidence on which a jury only can decide: [the Court assented to this, and said if the case were to depend upon this point, it would be necessary to order a second trial.]

Marryat in reply. The clause in the deed referred to is not to enable the trustees to pay *all* just debts, but all *such* just debts as they should think proper. The payment of 200 *l.* by the trustee was no consideration at all; for he was to be repaid out of the sale of the effects. And even if it were a consideration, it would not avail; because it was paid with full notice of all the circumstances, and of the object of the assignment. *Cadogan v. Kennett, Cowp.*

434. It does not follow that the right of action will have relation back, because the right itself of the assignees has such relation to the time of the act of bankruptcy. A right of action cannot be said to exist when no person can exercise it. It is suspended till the right of property is vested in some person by whom it can be exercised. The promise in law arises from the liability of the defendant to answer for the debt; but no such liability existed until the commission issued and the assignees were appointed.

LORD KENYON Ch. J. Without considering the harshness of this demand on the part of the plaintiffs, I think that they cannot recover; and my opinion proceeds on the merits of the case, on the validity of the deed of *October* 1793. This question does not arise on the statute of *James*: if indeed a commission of bankrupt had been taken out against the defendant's husband, this deed would have been ipso facto an act of bankruptcy, because it was an assignment of all his property. But, putting the bankrupt-laws out of the case, a debtor may assign all his effects for the benefit of particular creditors. With regard to the statute of *Elizabeth*; that act contained, no doubt, wise provisions as applicable to the cases to which it was meant to apply. And if this deed were either actually fraudulent, or voluntary from which the law infers fraud, then the consequence insisted upon by the plaintiffs would follow and the defendant would be obliged to repay this money. But that it was not fraudulent in fact is perfectly clear; nor do I think that it was voluntary. Consider what was the condition of the parties; the husband and wife were living together on bad terms; the former was squandering away the property and ill-treating the wife, and in order to prevent his ill-using her in future, and to prevent her instituting a suit in the Spiritual Court, and to put an end to all differences, and in consideration of 200 *l.* advanced by

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one of the trustees, this deed was executed. It is said however that this was merely a loan of the 200*l.* by the trustee: but I do not see why this was not a consideration to support the deed. In deciding questions of this kind the courts have always disavowed enquiring, whether or not the consideration be equivalent; they will not weigh it in very nice scales if it be an honest transaction. Then what was done for this valuable consideration; a provision was first made for the husband himself; he was to receive 200*l.*, the amount of his own property; then provision was made for the payment of all his just debts; and lastly the residue was to be a provision for the wife so ill-used and so deprived of an appeal to the laws of her country for alimony. I admit that, if this were a voluntary deed, the law says it is fraudulent: but I consider this deed as having been made for a valuable consideration and not voluntary. I read over those parts of the deed not set forth in the case in order to see whether or not the trustees had indemnified the husband against the future debts of the wife; and though the deed contain no covenant of that kind, much was to be done by the trustees; they were to enter on the farm and to be at the expence of carrying it on. Very small considerations have been holden sufficient to give validity to a deed; where in framing family settlements limitations are made in favour of the distant branches of the family, such remainders are not considered as voluntary if the object of the parties in making the settlement were fair and honest: but this is a much stronger case, for here there was an immediate consideration; independently of the provision for the husband, he was relieved from the consequences of a suit in the Spiritual Court. Nor does it appear that there were any debts of the husband that were not satisfied: the contrary rather appears; it being stated in the case that, in consequence of an advertisement inserted in the public papers for his creditors to come in, all who sent in their demands received 20*s.* in the pound. Therefore on the merits of this case, leaving the other question respecting the Statute of Limitations untouched, I am of opinion that this deed was not only a fair and conscientious deed as between the parties but also that there was a good consideration for it that delivers it from all objections by those who now wish to impeach it, and consequently that the plaintiffs cannot recover in this action.

GROSE J. The principal question turns on the validity of the deed to the trustees: if that deed were fraudulent as being made for the purpose of deceiving creditors, or if it were fraudulent in

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law as being voluntary, the consequence would be that the plaintiffs would be entitled to recover. But there is no pretence to say that there was any actual fraud in it; no creditor was prejudiced by it; every creditor after the advertisement in the papers came in and received the whole amount of his debt. Then was this a voluntary deed, and so legally fraudulent; my Lord Chief Justice has shewn that it was given for a valuable consideration, and has gone into this point so fully that I cannot add to what he has said.

LAWRENCE J. It is evident that there was no intention in any of the parties to the deed to commit a fraud. It does not appear that any creditor was to be excluded, though that part of the deed is awkwardly worded. It could not have been intended that the plaintiffs in this action should be defrauded; for they did not exist in the character of creditors at the time when this deed was made. With regard to the supposed want of consideration; the wife had a right under these circumstances to apply to the Spiritual Court for alimony: but it was not necessary for her to take that step if the husband were inclined to make a provision for her without. Therefore I cannot say from any thing that appears in the case that any fraud was intended to be practised on the creditors of the husband, or that this must be considered as a voluntary deed for which there was no consideration; and if so, the second question does not arise here.

LE BLANC J. The question is whether or not this deed were fraudulent or voluntary and without any good consideration. Whether or not a deed is to be considered as fraudulent with respect to creditors must depend on the motives of the party making the deed. Now at the time when this deed was executed there was no debt due from the husband to the plaintiffs; no commission of bankrupt had then been taken out against *W. Wilsmore*, nor does it appear that there was then any reason to apprehend that a commission would be afterwards taken out. But the husband, being liable to be called upon to answer in the Spiritual Court for his conduct to the wife, executed this deed, by which a provision was made not only for his wife but also for the payment of all his creditors. And it appears that all the creditors who made any demand upon this estate received the whole of their debts. Therefore I think that this deed can neither be considered as actually fraudulent with respect to the creditors in general or

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to these plaintiffs in particular, or as voluntary because without consideration and therefore fraudulent in law.

Per Curiam, Judgment of nonsuit to be entered.

ELLIS *against* TURNER and Another.

THIS was an action on the case to recover damages against the defendants for not delivering according to their contract certain goods of the plaintiff at *Stockwith* in *Nottinghamshire*, which were shipped on board the defendants' vessel at *Hull*. On the trial at *Nottingham* before Mr. Baron *Chambre* a verdict was found for the plaintiff, damages 79*l.* 11*s.* 5*d.*, subject to the opinion of this Court on the following case.

Messrs *Martin* and *Rootb* who are public wharfingers in *Hull* shipped the plaintiff's goods at *Hull* in *March* 1799 to the value of 106*l.* 18*s.* 5*d.* with the goods of several other persons in the defendants' vessel to be carried from thence to *Stockwith*, which is between *Hull* and *Gainsborough*, for the carriage of which goods it was understood but not expressed by the parties that the customary freight was to be paid by the plaintiff to the defendants; but no agreement was entered into by the plaintiff for the payment of any extra freight by way of indemnity or insurance against risk or loss. The vessel at the same time took in other goods at *Hull* to be delivered at *Gainsborough*. The freight of the carriage of goods from *Hull* to *Stockwith* is the same as from *Hull* to *Gainsborough*. The vessel had before the voyage in question taken in goods at *Hull* for *Stockwith* and *Gainsborough*, and had some times delivered the goods for *Stockwith* at that place without carrying the same forward to *Gainsborough* and at other times had carried the *Stockwith* goods forward to *Gainsborough* and delivered the same at *Stockwith* in returning from *Gainsborough*. On the voyage in question the plaintiff's goods were delivered to the Master of the defendants' vessel by a clerk or servant of Messrs. *Martin* and *Rootb* on condition that he would deliver them at *Stockwith* as he passed by in his way to *Gainsborough*, which he (the master) expressly undertook to do. The undertaking to deliver the plaintiff's goods at *Stockwith* as last aforesaid was made by the master of the defendants' vessel without the privity or knowledge of the defendants. It is not usual for the master to confer previously with the owner of the vessels as to the terms on which he

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The owners of vessels on the navigation between A. and C. having given public notice that they would not be answerable for losses in any case, except the loss were occasioned by the want of care in the master, nor even in such case beyond 10*l.* per cent., unless extra freight were paid, the master of one of the ships took on board the plaintiff's goods to be carried from A. to B. (an intermediate place between A. and C.) and delivered at B.; the vessel passed by B. without delivering the plaintiff's goods there, and sunk before her arrival at C. without any want of care in the master; held that the owner of the vessel was responsible to the plaintiff for the whole loss in an action on the contract.

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is to take goods on board, he having a general authority or discretion to receive and convey goods for the customary freight from *Hull* to *Stockwith* and *Gainsborough* as above mentioned. The defendants' vessel arrived in perfect safety at *Stockwith*, and the master stopped and delivered some part of the goods which were consigned there, and was particularly requested by Mr. *Dales* (a wharfinger at *Stockwith*) to deliver the remaining part of the goods which he had on board for *Stockwith*, but the master without the privity or knowledge of the defendants refused to deliver such goods, alleging that he was unable to deliver them by reason of their being underneath the goods intended to be delivered at *Gainsborough*. In proceeding from *Stockwith* to *Gainsborough* the defendants' vessel without any want of ordinary care or attention of the master or crew sunk in the river *Trent*, whereby the plaintiff's goods were damaged. The proceeds arising from the sale of the plaintiff's goods in their damaged state, amounting to 18*l.* 10*s.*, were received by the defendants' and have since been paid into court, and being deducted from the above sum of 106*l.* 18*s.* 5*d.* reduces the plaintiff's demand to 88*l.* 8*s.* 5*d.*, upon which last mentioned sum the defendants have also paid into court the sum of 10*l.* per cent. In *September* and *October* 1798 printed hand-bills, of which the annexed is a copy (a), with the names of the defendants and of several other owners at the foot thereof, were left at the respective dwelling-houses of the merchants and wharfingers in *Hull*, and were also posted up at the Exchange and Custom-House and at the Wharfingers' staiths and warehouses and in other public parts of the town of *Hull*, but the same were not published in the *Gazette* or in the *London* or *Provincial Newspapers*. *Martin* and *Rooth*, by whom the plaintiff's goods were so shipped in the defendants' vessel, had such printed hand-bills left with them, and knew the contents thereof, previous to the time when they so shipped the same, but had not given any information thereof to the plaintiff, who is a grocer and resides at *Mansfield* in the county of *Nottingham*; nor did the plaintiff know of any such notice having been given by the defendants. The question for the opinion of the Court is, Whether the defendants

(a) The substance of that notice was that in future the owners of vessels would not be answerable for any loss or damage that might happen to any cargo, unless such loss or damage should be occasioned by the want of ordinary care and diligence in the master

and crew, in which case they would pay 10*l.* per cent. upon the loss or damage, provided such payment did not exceed the value of the vessel;—but that they were willing to insure against all accidents on receiving extra freight in proportion to the value &c.

are liable to pay any further sum beyond what they have paid into court; if they are so liable, then the verdict to stand; if otherwise, a verdict to be entered for the defendants.

When this case was called on for argument,

LORD KENYON Ch. J. (addressing himself to the defendants' counsel) asked whether the defendants were not at all events liable in this action, they having had an opportunity of delivering the goods at *Stockwith* in safety before the vessel proceeded towards *Gainsborough*;

Balguy, for the defendants, answered that this was an action on the contract for not safely carrying and delivering the goods at *Stockwith*, and that the non-delivery of the goods there was owing to the misconduct in the master of the vessel for which the defendants were not answerable in this form of action, and that if they were liable at all the action should have been for the tort.

LORD KENYON Ch. J. Perhaps as between the defendants and their servant, the master of the vessel, this was misconduct in the latter; but as between the defendants and third persons the former are answerable upon their contract. The maxim applies here *respondeat superior*. The case is shortly this; this vessel belonging to the defendants, trading from *Hull* to *Gainsborough*, took on board some goods belonging to the plaintiff which were to be delivered at *Stockwith*; the vessel went safe as far as *Stockwith*, and there delivered part of the cargo; but the master of the vessel finding it inconvenient to deliver the rest there proceeded on her voyage and sunk before her arrival at *Gainsborough*. The defendants (the owners) are called upon to make good the loss that happened to the plaintiff's goods; and as the vessel reached *Stockwith* in safety and might have delivered the plaintiffs' goods there, I think that this action may be maintained. For though the loss happened in consequence of the misconduct of the defendants' servant, the superiors (the defendants) are answerable for it in this action. The defendants are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them; as if he were to commit an assault upon a third person in the course of his voyage.

Per curiam,

Postea to the plaintiff.

1800.

ELLIS
against
TURNER
and Another.

1800.

Wednesday,
May 14th.ARDING *against* FLOWER and Another.

A bankrupt attending, upon notice for that purpose, a meeting of the commissioners to declare a dividend of his estate is protected from arrest at the suit of a creditor during such attendance, although several years after his last examination.

THIS was an action on the case against the Sheriffs of *London* for having suffered one *Wm. Chaytor* to escape who had been arrested by virtue of a writ issued against him at the suit of the plaintiff for a debt of 34*l.* 10*s.*, and for having afterwards made a false return of non est inventus to the said writ. At the trial before Lord *Kenyon* at *Guildhall* a verdict was taken for the plaintiff, with liberty for the defendant to move this Court to enter a nonsuit if they should be of opinion that *Chaytor* was privileged from arrest at the time under the circumstances; as to which the facts appeared to be these.

In *November* 1795 a commission of bankrupt issued against *Chaytor*, under which he was duly declared a bankrupt, and the usual proceedings were had. His last examination was in *January* 1796, and in the same year he obtained his certificate. The debt to the present plaintiff accrued afterwards. A meeting of the commissioners was advertised for the 5th of *October* 1799 at *Guildhall* for the purpose of declaring a dividend of the bankrupt's estate, which meeting the bankrupt had verbal notice to attend from the messenger to the commission, but had received no regular summons from the commissioners. It appeared to be usual to give such notices to bankrupts, as their attendance on such occasions was frequently found necessary in order to explain questions which arise respecting their accounts; and in fact the bankrupt in this instance had been appointed to collect some of the debts due to his estate. The bankrupt obeyed the notice; and was giving his attendance at the time the commissioners were assembled for the purpose of making the dividend when he was arrested by the Sheriff's officer at the suit of the plaintiff. But the matter being immediately represented to the commissioners, and their protection demanded on behalf of the bankrupt, they caused it to be signified to the officer that the bankrupt was then attending their meeting in discharge of his duty, and that if he were detained under the arrest the Lord Chancellor on petition to him would commit the officer for a contempt; whereupon the officer declined keeping the bankrupt in custody.

Mingay and *Manley* shewed cause against a rule obtained for setting aside the verdict and entering a nonsuit. This is an attempt

to extend the protection of the bankrupt's person from arrest much further than is warranted by the acts of parliament or by any adjudged case. By the stat. 5 Geo. 2. c. 30. §. 5. the bankrupt is privileged from arrest during the forty-two days allowed by the act for his surrender and examination, or for such further time as shall be allowed by the Lord Chancellor for that purpose, or, according to the last decided case of *Davis v. Trotter* (a), during the enlarged time given to him by the authority of the commissioners themselves for completing his examination. But here his examination had been completed several years before; and if his privilege be notwithstanding to remain, it will be difficult to draw the line and say when it is to cease. In the case *Ex parte Turner* (b) *Ld. Hardwicke* was of opinion that the bankrupt's privilege from arrest could not extend further than the forty-two days or the enlarged time at most. The case of *Kenyon v. Solomon* (c) proceeded on the same ground. Besides, there is no pretence here to say that the bankrupt was attending by the authority of the commissioners; for he had not been summoned by them, and his attendance was purely voluntary.

LORD KENYON Ch. J. As to the last observation, it must be taken that the bankrupt was attending by virtue of the authority of the commissioners; for he received the usual notice to attend, and the commissioners afterwards adopted the act of the messenger. On the principal question I think that the bankrupt was privileged from the arrest. And my opinion does not proceed upon the words or construction of the statute of Geo. 2., but on general principles; considering the bankrupt in the character of a witness or party (d) attending commissioners employed under the authority of an act of parliament, sitting in the nature of a court in the administration of justice. If the attendance of the party on persons so authorized be required in order to give them material information on the subject of their inquiry, it cannot be made a question whether or not he is entitled to protection from arrest upon such an occasion. It was said by Lord *Henley* (e) that the commissioners are a Court of Justice sufficient for the purpose of having their witnesses protected at least by the Court of Chan-

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ARDING
against
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(a) *Ante*, 475.

(b) 1 *Atk.* 148.

(c) *Cowp.* 156.

(d) *Vide* 1 *Brownl.* 15. but where the party comes without process or necessity

then it is said he is not privileged *eundo et redeundo*. *Anon. Salk.* 544.

(e) *Ex parte Stowe*, 13th of November 1762. *Vide* 2 *Blac. Rep.* 1142.

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cery if not by themselves. If so, I cannot distinguish between the case of a witness and that of the party himself (a), whose presence may be equally necessary to explain his own case. Et ubi eadem est ratio idem est jus. Then as to there being no compulsion on the bankrupt to appear in this case, it is not necessary to the protection of a witness in ordinary cases that he should have been compelled to give his attendance by being served with a subpœna, if upon application to him he were willing to attend without one: but here that question does not arise, because the commissioners adopted the act of the messenger.

Lawrence J. referred to a case of *Hetley* in the Exchequer Tr. 1788, mentioned in the last edition of *Com. Dig.* tit. privilege (from arrest) where it was holden that the party to a cause was privileged from arrest for debt during his attendance on an arbitration under a rule of nisi prius.

Per Curiam,

Rule absolute (b).

Garrow and Marryatt were to have argued in support of the rule.

(a) Vide *Lightfoot v. Cameron*, 2 Blac. Rep. 1113. (b) Vide *Kinder v. Williams*, ante, 4 vol. 377.

Wednesday,
May 14th.

The KING against J. JUKES and Two Others.

A statute
directs that
no per-
son shall
expose to
sale metal
buttons

marked with the word *gilt* (the same not being really gilt) knowing the same not to be gilt, under a certain penalty; a conviction charging that the defendants did the act *unlawfully and fraudulently, contrary to the form of the statute*, is bad, without an express charge that they did it *knowingly*. And such a defect is not aided by a proviso in the statute that "no conviction for any offence in the act should be set aside for want of form, or through the mistake of any fact circumstance or other matter, provided the material facts alleged were proved;" for this in effect requires all material facts to be *alleged*; and *knowledge* is a material fact to constitute such an offence.

(a) That statute, after reciting that frauds had been committed in the marking &c. of metal buttons intimating that they were of a superior quality to what they really were, enacts (by section 1.) that no person shall order the words *gilt* or *plated* or other words indicating the quality of buttons to be marked thereon unless he shall order such buttons to be gilt or plated respectively; and that no person shall procure or purchase buttons so marked knowing them not to be gilt or plated respectively, on pain of forfeiting a certain sum.

S. 2. enacts that no person shall print, cast, stamp, or mark, or cause &c., in or upon any part of any metal button the words *gilt* or *plated*, or any other word &c. indicating the quality or any word &c. on the underside thereof, whether the same do or do not indicate the quality, unless the same be respectively really and bona fide plated with silver, before the same shall be so printed, stamped &c. as aforesaid, or afterwards gilt with gold, or destroyed before being sold; and that no person shall affix,

or

W. J. V.

October in the year of our Lord 1799 at *Birmingham* in the county of *Warwick* aforesaid *Robert Thursfield* of *Birmingham* aforesaid in the county aforesaid yeoman came before us *William Villers* and *William Hicke* Esqrs. two of his Majesty's Justices of the Peace for the said county, and informed us that *Joseph Jukes* *John Jukes* and *John Pitt* all of *Birmingham* aforesaid in the county aforesaid button-makers within the space of three calendar months then last past (to wit) on the 6th day of *September* now last past at *Birmingham* aforesaid in the county aforesaid did unlawfully and fraudulently put and place and cause to be put and placed for sale in and upon certain cards and papers divers metal buttons, to wit, 5138 dozen of metal buttons, the said metal buttons and each and every of them having then and there stamped or marked on the underside thereof a certain word indicating the quality thereof, (to wit,) the word *gilt*, the said metal buttons or any of them not being gilt with gold, within the true intent and meaning of the statute in such case made and provided, contrary to the statute in such case made and provided, whereupon &c."; then the conviction stated the summons, the appearance, and plea of the defendants, the examination of witnesses, and the adjudication of the justices &c., by which the defendants were convicted as far as respected 4214 dozen, and acquitted of the remainder of the charge. The defendants appealed to the quarter sessions at *Warwick*, where the conviction was affirmed, and the sum of 100*l.* for costs was awarded to the prosecutor.

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or cause &c. upon any metal button, having the words *gilt* or *plated*, or any other word &c. indicating the quality, on any part of such button, or any word &c. on the underside thereof, whether the same do or do not indicate the quality, any ornament, unless those parts of such button which shall not be covered by such ornament be respectively really and bona fide plated with silver, or gilt with gold, before such ornament shall be affixed thereon; and that no person shall put, or pack, or cause, &c. to be packed up for sale in or upon any card or paper &c. or sell or expose to sale &c. any metal buttons, not being gilt with gold or plated with silver respectively, if the words *gilt* or *plated*, or any other word &c. indicating the quality of such buttons be printed or marked in or upon any part of such buttons, or upon such card (not being the pattern card or paper, &c.) or if any word &c. be printed or marked on the underside of such buttons,

whether the same do or do not indicate the quality, knowing the same not to be gilt with gold or plated with silver respectively; upon pain of forfeiting in every of the cases aforesaid such buttons together with the sum of 5*l.* for any quantity of such buttons exceeding one dozen, and not exceeding twelve dozen; and for any quantity of such buttons exceeding twelve dozen, at and after the rate of 1*l.* for every twelve dozen &c. *Stat. 11. enacts* "That no conviction made upon any offence in this act mentioned shall be set aside in or by any Court for want of form, or through the mistake of any fact circumstance or any other matter whatsoever, provided the material facts alleged in such conviction, and upon which the same shall be grounded, be proved to the satisfaction of the said Court; any law, statute, or custom, to the contrary notwithstanding."

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 against
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Perkins took two objections to the conviction. 1st, The defendant is only charged with having *unlawfully and fraudulently* exposed to sale metal buttons marked with the word *gilt*, which were not *gilt*: but it is not alleged that he did this *knowing that they were not gilt*; and such knowledge is a constituent part of the offence against this branch of the clause on which the defendant is convicted. The fact of knowledge must be expressly alleged as required by the statute, and cannot be implied, 2 *Hawk. c. 25. §. 110.* In *Cox's case (a)* it was admitted by the Judges in giving judgment that in an indictment for perjury on the stat. 5 *Eliz. c. 9.* the word *wilful*, which is used in the statute, must necessarily be charged in stating the offence; though they held it not necessary in an indictment at common law, but that it might be intended from the words "falsely maliciously wickedly and corruptly." So in *Davis's case (b)* it was holden that an indictment on the black act must charge, in the words of the statute, that the offence was committed "wilfully and maliciously"; and an indictment substituting the word *unlawfully* for *wilfully* was deemed insufficient; though it was argued that the word *maliciously*, which was retained, implied *wilfully*. Neither can the fact of knowledge be necessarily implied here from the words "*unlawfully and fraudulently.*" For what is unlawful is a mere conclusion of law to be deduced from the facts stated. And the defendants may have fraudulently exposed these buttons to sale in other respects, without knowing that they were not *gilt*; as by having fraudulently packed them in such a manner as to represent a larger number than there really was; or by having mixed together buttons of different qualities, which is made a substantive offence by the sixth section. Besides, that which constitutes fraud is an inference from facts; and those facts ought to be stated to enable the Court to judge whether the act imputed to the defendants be fraudulent within the meaning of the statute. Neither will the omission be supplied by the general conclusion "contrary to the form of the statute." *Hamper's case* 2 *Leon* 211. *Rooke's case* *Hardr.* 20. *Jarvis's case* 1 *Burr.* 148. *Colborne v. Stockdale* 1 *Str.* 493. *Dy.* 363. *pl.* 25. *R. v. Wheatley* 2 *Burr.* 1125. *Corden's case* 4 *Burr.* 2279. 2 *Hawk. c. 25. §. 110.* If then the conviction be defective in this respect, it will not be aided by the proviso in the 11th section; because so far as the meaning of that clause can be collected, there is a proviso that *material* facts must be alleged in the conviction; for it requires that all such

(a) *Leach Cases in C. L.* 65.

(b) *Id.* 391.

facts shall be proved: and here the knowledge of the defendant was a material fact within the terms of the enacting clause. Secondly, it is not alleged that at the time when the buttons were exposed to sale on the cards they were not gilt in the manner required by the act. The fact as laid may refer to the time of the conviction (*a*). *Bridges and Others* (*b*) were indicted for a forcible entry on certain lands, existens liberum tenementum of J. S. &c.; and because the indictment was not adhuc existens &c, it was holden ill and discharged. In like manner convictions on the game laws in negating the defendant's qualification always point to the time of committing the offence; as "not having *then* lands" &c.

Burton Morice contra. As to the first objection; the object of the legislature in this act was to guard against fraud in an important branch of manufacture. And to facilitate the punishment of offenders they have anxiously guarded by the 11th section against a failure of justice on account of objections respecting the form of proceedings; and therefore they have provided that no defect in the manner of drawing up the conviction shall vitiate the conviction, provided all the material facts alleged against the defendants be proved to the satisfaction of the Court. Then admitting the fact of knowledge in the defendants to have been necessary to be shewn in order to convict them, it must now be presumed to have been proved. It is sufficient if upon the face of the conviction such knowledge be substantially alleged. Now that is necessarily implied in the charge that the act was committed "*unlawfully and fraudulently, contrary to the form of the statute.*" The word *fraudulently* of itself imports *knowingly*, though not *è* converso. But at any rate the fraud could not have been *unlawful and contrary to the form of the statute*, unless it were accompanied with such knowledge as constitutes the offence within the meaning of the statute. The proviso in the 11th section will be rendered nugatory, unless it be so construed as to dispense with the use of technical words in the conviction. All that is thereby required is to state the substance of the offence. In an indictment for perjury at common law, though the offence must be proved to have been done *wilfully*, it is sufficient to charge that it was done *maliciously*, because that implies the other, though the word *wilful* is essential to an indictment on the statute for the same offence, according to *Cox's* case before cited (*c*). So here by virtue of the proviso the necessity of charging knowledge in positive terms is dispensed with, and it may

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(a) Vide 2 Hawk. c. 25. s. 61. (b) Cro. Jac. 639. (c) Leach 65.

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be implied from the other words in the conviction. In *R. v. Jefferies* (a), where a summary form of conviction was given by an act of the 31 Geo. 3. c. 21. s. 4., and the statute directed that it should be drawn up in that form or to that effect, it was deemed sufficient to use terms which were synonymous to those mentioned in the statute.

LORD KENYON Ch. J. This act of parliament is of great importance to the trade of the country; and I only lament that the prosecutor has not followed the words of the act in this conviction. It is melancholy to reflect that bad manufacturers have at different times been the means of losing some of the important branches of trade to this country and to *Ireland*. One instance of this kind occurred in the beginning of the reign of *Geo. 1.* or in the latter end of that of *Queen Anne*, where in consequence of some badly manufactured linen being sent from *Ireland* to *Spain* the whole of the linen trade to *Spain* was lost. Perhaps the bad manufacture of this commodity had endangered this branch of our trade with other countries, and therefore the legislature interfered in framing this act of parliament to guard against frauds in future. But however necessary it may be to enforce the provisions of this act, we must see when the case comes before us that the prosecutor brings his case within it. And though the act has prescribed the form of conviction, it is necessary that it should appear on that form of conviction that the offence created by the act has been committed. With regard to the section in the act that no conviction shall be quashed for want of form, I confess I am not able to understand it as applied to proceedings removed into this Court. It enacts that no conviction on this act shall be set aside by any Court for want of form or through the mistake of any fact circumstance or other matter whatsoever, *provided the material facts alleged in such conviction and upon which the same shall be grounded be proved to the satisfaction of the said Court*. I can understand it as far as it respects the proceedings before the sessions on an appeal. On an appeal the whole case is to be gone into, evidence is to be given to support the conviction; and then it may be known whether or not the material facts alleged in such conviction and upon which the same shall be grounded be proved *to the satisfaction of that Court*. But when the conviction is removed here by certiorari, I do not understand how we can inquire into those facts; is the inquiry to

(a) *Ante*, 4 vol. 767.

be made by affidavits; or are we to hear *vivâ voce* evidence of the case.

The great question here is whether or not the material facts to constitute the offence be alleged in the conviction; I think that they are not. In some kinds of prosecution the Courts wish to find out a ground of excuse for the party prosecuted: but in this case, where most probably the defendants have infringed a salutary law made for the preservation of a very important branch of the manufactures of this country, I should be glad to find some legal grounds on which the conviction could be supported. But here an essential part of the description of the offence is omitted, namely, the knowledge of the defendants that the buttons in question were not gilt with gold. It is merely stated that the defendants did this "unlawfully and fraudulently:" but that is not sufficient. If they exhibited for sale goods that were not what they professed to be, that would be fraudulent: but if they exhibited the buttons for sale marked "gilt" without knowing the same not to be gilt, it is not an offence within the act of parliament. In order to have brought this case within the act of parliament, it should have been alleged that the defendants "knew the same not to be gilt with gold;" and for this omission I am obliged to say (contrary to my wishes upon the subject) that this conviction cannot be supported.

GROSE J. We all know instances of parts of the trade of this country having been lost in consequence of frauds in our manufactures having been committed; and therefore the act of parliament on which this conviction is founded is a very salutary law: but, notwithstanding that, we must consider whether or not this conviction is warranted by the act. It seems admitted that it was necessary to state in the information an offence contrary to the act: the offence intended to be stated in this information was exposing to sale buttons marked "gilt," knowing at the same time that the buttons were not gilt. The latter part of the description, the knowledge of the defendants, is omitted; and I think it would be too much to say that that is supplied by the words "fraudulently and unlawfully." Those in general are mere words of course, and are not equivalent to the word "knowingly." Therefore it does not appear upon this conviction that the defendants were charged with any offence against this act of parliament.

LAWRENCE J. It is admitted by the prosecutor that it is necessary to state in the information all the essential facts that constitute

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against
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the offence, and that one of those facts is the knowledge of the party that the buttons exposed to sale and marked "gilt" were not gilt. But it is contended that it is not necessary to state in words that the defendants knew that the goods were not gilt, for that the same thing may be charged by words that are tantamount to knowledge, and that the words here used "fraudulently and unlawfully" are tantamount to it: but I cannot assent to the conclusion. The seller may commit a fraud by selling buttons as gilt that are not gilt; and whether or not he knew that fact, the buyer is equally defrauded: but, unless he do know it, it is not such a fraud as is described by this part of the act. And upon this conviction it does not appear that the defendants knew that the buttons in question were not gilt. Therefore allowing that there would be great weight in the argument if the words used in the conviction were equivalent to "knowingly," yet, as I think that the words "fraudulently and unlawfully" are not equivalent to it, I am of opinion that the conviction must be quashed.

LE BLANC J. of the same opinion.

Per Curiam,

Conviction quashed.

Saturday,
May 17th.

The KING *against* JOSEPH JUKES and two Others.

A summary
conviction for
any offence
created by
statute must
negative

THIS was another conviction against the same defendants (who were before the Court on a former day) (*a*) on the Stat. 36. Geo. 3. c. 60. s. 3. and 4. (*b*), in the following form.

every exception contained in the clause creating the offence. And a defect in omitting to do so is not aided by a proviso in the statute that "no conviction for any offence in the act shall be set aside for want of form, or through the mistake of any fact circumstance or other matter, provided the *material* facts *alleged* were proved;" for this in effect requires all *material* facts to be alleged; and it is a material fact that the defendant did not come within any exception in the enacting clause.

If a statute authorizing a summary conviction before a magistrate give an appeal to the sessions who are directed to hear and finally determine the matter, this does not take away the certiorari even after such an appeal made and determined (*).

(*) Vide *Rex v. Mesley* and others, 2 Burr. 1042. *Rex v. Eaton*, ante, 2 vol. 89. and *Rex v. Sparrow* and another, ib. 196. n; and vide *Cates qui tam v. Knight*, ante, 3 vol. 442.

"Be

(a) See the preceding case.

(b) By s. 3. no person shall mark or cause to be marked &c. in or upon any part of any metal button any word &c. indicating the quality thereof except the words *gilt* or *plated* respectively; and no person shall place or pack or cause to be packed &c. for sale in or upon any card (*except the patent card or patent cards*) or paper &c. or expose to sale or cause to be sold or exposed to sale any metal buttons having any word &c. in-

dicating the quality thereof other than and except the words *gilt* or *plated* respectively marked &c. in or upon any part thereof, upon pain of forfeiting in every such case such buttons together with 5 l. for any quantity exceeding one dozen and not exceeding 12 dozen, and for any quantity exceeding 12 dozen at the rate of 1 l. for every 12 dozen, to be levied &c.

Sec. 4

"Be it remembered that on &c. *R. Thursfield* of &c. came before us, &c. and informed us that *J. Jukes* &c. on &c. did unlawfully and fraudulently put and place for sale and cause to be put and placed for sale in and upon certain cards and papers divers metal buttons, to wit, 1780 dozen of metal buttons, the said metal buttons and each of them having marked or stamped on the under-side thereof certain words indicating the quality thereof, to wit, on 942 dozen part thereof the words "double gilt," and on 838 dozen other part thereof the words "treble gilt," the said buttons so respectively marked "double gilt" or any of them not being double gilt within the true intent and meaning of the statute in such case made and provided, and the said buttons so marked "treble gilt" or any of them not being treble gilt within the true intent and meaning of the statute in such case made and provided; contrary to the form of the statute &c."

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against
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When this case was called on

Lord KENYON C. J. observed that this conviction could not be supported because the information did not negative the exception introduced in the clause enacting the offence, viz. that the buttons had been exposed to sale in this instance *upon the pattern cards*. In like manner as in convictions on the game laws it had always been deemed necessary to negative in the information the defendant's qualifications to kill game. That the only cases where this was not necessary to be done were where the exception was introduced in a subsequent clause; and there it must come by way of defence on the part of the defendant.

Burton Morice, in support of the conviction, admitted that the current of authorities tended to establish that distinction; but referred to *R. v. Theed (a)*, where to a conviction for obstructing an excise officer in coming to weigh candles, by virtue of the Stat. 8 Ann. c. 9. s. 10. (which gives the officer power to enter by day or night, but if by night then it is required to be in the pre-

(a) 1 Str. 608.

Sec. 4 provides that nothing in the act shall extend to inflict any penalty &c. upon any person who shall mark or cause to be marked &c. the words *double gilt* in or upon any metal buttons, or pack or cause to be packed &c. for sale in or upon any card (except the pattern card) or paper &c. or expose to sale or cause to be sold or exposed to sale any metal buttons having the words *double*

gilt marked &c. in or upon any part thereof; provided continually from the time of gilding thereof gold shall remain equally spread upon the upper surface of the said buttons exclusive of the edges in the proportion &c. therein specified. The clause also contains a similar provision as to buttons having the words *treble gilt* upon them.

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The KING
against
JUKES.

sence of a constable) it was objected that it did not state whether the entry were by day or night; and non constat but that it might have been by night, without a constable; and then the defendant might lawfully obstruct him.

Lord KENYON C. J. That case may upon examination be found to be distinguishable from those which I have before referred to: but at all events the weight of authorities as applicable to this case is the other way; and the point has been repeatedly settled in later determinations.

B. Morice then relied on the 11th section (a) of the act in question, by which it is only made necessary to set out such material facts as constitute the offence charged; saying that this was a mere formal objection, and if available at all was matter of defence for the defendant on the hearing. That it would not be necessary in an indictment on a statute to negative that the defendant is within any of the provisos therein, which are matter of defence to the charge; 2 *Hawk. c. 25. s. 113*; and that greater form was not necessary under the 11th section than would be necessary in an indictment at common law.

Lord KENYON C. J. This is not an objection of form but of substance; and the reason is well given by *Hawkins* (b) why a conviction should negative all the exceptions in the enacting clause, because the party cannot plead to such a conviction and can have no remedy against it but from an exception to some defect appearing on the face of it; and all the proceedings are in a summary manner. Therefore the conviction itself should shew that the party accused had not the defence, which the act gives to him, if true. Even by the saving clause all material facts necessary to constitute the offence must be stated: this then is a material fact, that the buttons exposed to sale were not on pattern cards. The good sense of the thing is in support of what is said by *Hawkins*; for being a summary proceeding and conclusive on the defendant, it ought to have the greatest certainty on the face of it.

B. Morice then objected that, the defendant having elected to appeal to the sessions, the certiorari was in effect taken away by the act, because it said that the determination of the sessions should be final (c). But

Lord KENYON C. J. said that would be against all authority; for the certiorari being a beneficial writ for the subject could not be taken

(a) Vide this section set forth in note 537. |
sup.

(b) 2 *Hawk. c. 25. s. 113.*

(c) *s. 9.*

away without exprefs words; and he thought it was much to be lamented in a variety of cafes that it was taken away at all.

Per Curiam,

Conviction quafhed.

1800.

The KING
againſt
JUKES.

MARSHALL *againſt* MARY RUTTON.

Saturday,
May 24th.

LORD KENYON C. J. delivered the judgment of the Court in this cafe as follows.

This is an action of affumpfit brought by *John Marshall* againſt *Mary Rutton* for goods fold and delivered to her, for work and labour, and money laid out to her uſe, and on other general counts. To this the defendant has pleaded her coverture with one *Iſaac Rutton*, who is ſtill alive. The plaintiff has replied, that before making the promiſes of the defendant ſhe and her huſband had mutually covenanted and agreed to live ſeparate and apart, that a ſeparation accordingly took place between them, and that they have continually from thenceforth lived and ſtill live ſeparate and apart; that a competent ſeparate maintenance ſuitable to the eſtate and degree of the defendant, of 200 l. per annum, was in due form of law ſecured to her by deed during the joint lives of her and her huſband, which has been duly paid to her; and that the promiſes in the declaration were made ſubſequent to the ſeparation of her and her huſband. The defendant has rejoined, admitting the ſeparation between the defendant and her huſband before the promiſes &c, and ſtating the deed mentioned in the replication as being a deed of articles of agreement made between the ſaid *Iſaac Rutton* and herſelf of the one part and *Thomas Rutton* of the other, whereby it was provided that the ſeparate maintenance ſhould be paid for ſuch time only as the defendant ſhould ſuffer the ſaid *Iſaac Rutton* to live ſeparate and apart from her, and the defendant ſhould maintain a chaſte due and becoming conduct, and ſhould ſupport and keep *Mary Rutton* and *Elizabeth Rutton* their two youngſt children without any other charge or incumbrance to the ſaid *Iſaac Rutton* &c; concluding with a traverse of the ſaid ſeparate maintenance being ſecured to her during the joint lives of her and her huſband. To this rejoinder the plaintiff, having cravedoyer of the articles of agreement, has demurred, aſſigning various cauſes which need not be ſtated; and the defendant has joined in demurrer.

A feme covert cannot contract and be ſued as a feme ſole, even tho' ſhe be living apart from her huſband, having a ſeparate maintenance ſecured to her by deed.

*See Lord Eldon's
opinion in Ward
v. Webb 2. P. W. 106.
& Fuller 106.*

*See alſo 3. W. 3.
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sence of a constable) it was objected that it did not state whether the entry were by day or night; and non constat but that it might have been by night, without a constable; and then the defendant might lawfully obstruct him.

Lord KENYON C. J. That case may upon examination be found to be distinguishable from those which I have before referred to: but at all events the weight of authorities as applicable to this case is the other way; and the point has been repeatedly settled in later determinations.

B. Morice then relied on the 11th section (a) of the act in question, by which it is only made necessary to set out such material facts as constitute the offence charged; saying that this was a mere formal objection, and if available at all was matter of defence for the defendant on the hearing. That it would not be necessary in an indictment on a statute to negative that the defendant is within any of the provisos therein, which are matter of defence to the charge; 2 *Hawk. c. 25. s. 113*; and that greater form was not necessary under the 11th section than would be necessary in an indictment at common law.

Lord KENYON C. J. This is not an objection of form but of substance; and the reason is well given by *Hawkins* (b) why a conviction should negative all the exceptions in the enacting clause, because the party cannot plead to such a conviction and can have no remedy against it but from an exception to some defect appearing on the face of it; and all the proceedings are in a summary manner. Therefore the conviction itself should shew that the party accused had not the defence, which the act gives to him, if true. Even by the saving clause all *material* facts necessary to constitute the offence must be stated: this then is a material fact, that the buttons exposed to sale were not on pattern cards. The good sense of the thing is in support of what is said by *Hawkins*; for being a summary proceeding and conclusive on the defendant, it ought to have the greatest certainty on the face of it.

B. Morice then objected that, the defendant having elected to appeal to the sessions, the certiorari was in effect taken away by the act, because it said that the determination of the sessions should be *final* (c). But

Lord KENYON C. J. said that would be against all authority; for the certiorari being a beneficial writ for the subject could not be taken

(a) Vide this section set forth in note 537. |
sup.

(b) 2 *Hawk. c. 25. s. 113.*

(c) *s. 9.*

away without express words; and he thought it was much to be lamented in a variety of cases that it was taken away at all.

Per Curiam,

Conviction quashed.

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MARSHALL *against* MARY RUTTON.

Saturday,
May 24th.

LORD KENYON C. J. delivered the judgment of the Court in this case as follows.

This is an action of assumpsit brought by *John Marshall* against *Mary Rutton* for goods sold and delivered to her, for work and labour, and money laid out to her use, and on other general counts. To this the defendant has pleaded her coverture with one *Isaac Rutton*, who is still alive. The plaintiff has replied, that before making the promises of the defendant she and her husband had mutually covenanted and agreed to live separate and apart, that a separation accordingly took place between them, and that they have continually from thenceforth lived and still live separate and apart; that a competent separate maintenance suitable to the estate and degree of the defendant, of 200 *l.* per annum, was in due form of law secured to her by deed during the joint lives of her and her husband, which has been duly paid to her; and that the promises in the declaration were made subsequent to the separation of her and her husband. The defendant has rejoined, admitting the separation between the defendant and her husband before the promises &c, and stating the deed mentioned in the replication as being a deed of articles of agreement made between the said *Isaac Rutton* and herself of the one part and *Thomas Rutton* of the other, whereby it was provided that the separate maintenance should be paid for such time only as the defendant should suffer the said *Isaac Rutton* to live separate and apart from her, and the defendant should maintain a chaste due and becoming conduct, and should support and keep *Mary Rutton* and *Elizabeth Rutton* their two youngest children without any other charge or incumbrance to the said *Isaac Rutton* &c; concluding with a traverse of the said separate maintenance being secured to her during the joint lives of her and her husband. To this rejoinder the plaintiff, having craved oyer of the articles of agreement, has demurred, assigning various causes which need not be stated; and the defendant has joined in demurrer.

A feme covert cannot contract and be sued as a feme sole, even tho' she be living apart from her husband, having a separate maintenance secured to her by deed.

See Lord Eldon's words in the case of Webb v. Wood, 2. Brown. & Fuller 106.

See also 3. Ves. Jun. 444.

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The general question, which arises on this record, is, whether by any agreement between a man and his wife she may be made legally responsible for the contracts she may enter into, and be liable to the actions of those who may have trusted to her engagements as if she were sole and unmarried. On account of the magnitude of the question, and from respect to the authority and learning of those judges, who in some late cases have holden that a feme covert living so separate from her husband is liable to be thus sued, we thought this a case fit to be argued before all the judges; and it has been twice argued, once in *Easter Term* 1798 (a) before all the then judges, except Mr. Baron *Perry*, and again in this Term before all the present judges, except Mr. Justice *Buller* whose absence on every account we had occasion to lament. And after a very full consideration the opinion of all the judges, who heard the last argument, is that this action cannot be supported.

The ground on which the plaintiff in this case rests his claim is an agreement between the defendant and her husband to live separate and apart from each other. That is a contract supposed to be made between two parties, who according to the text of *Littleton*, *f.* 168. being in law but one person, are on that account unable to contract with each other; and if the foundation fail, the consequence is that the whole superstructure must also fail. This difficulty meets the plaintiff in limine. If it did not, and the parties were competent to contract at all, it would then become material to consider how far a compact could be valid, which has for its object the contravention of the general policy of the law in settling the relations of domestic life, and which the public is interested to preserve; and which without dissolving the bond of marriage would place the parties in some respects in the condition of being single, and leave them in others subject to the consequences of being married; and which would introduce all the confusion and inconvenience, which must necessarily result from so anomalous and mixed a character. In the course of the argument some of these difficulties were pointed out; and it was asked, whether after such an agreement as this the temporal courts could prohibit if either party were to sue in the Ecclesiastical Court for the restitution of conjugal rights? Whether the wife, if she

(a) The case was argued the first time by *Watson* for the plaintiff and *Gaselee* for the defendant, and the second time by *Law* for the plaintiff and *Bayley* Serjt. for the defendant.

*See, however,
11. Mod. 22. 3.
Leib. 363. 2. Ventr.
217. 1. Bro. Parl.
Cas. 112. Pres. in
Cha. 496. 2. Bro.
Cha. Cas. 90. 3. Bro.
Cha. Cas. 614. 3.
Att. 550. See fur-
ther Cas. in Bridgm.
The Jurid. 429.*

committed a felony in the presence of her husband, would be liable to conviction? Whether they could be witnesses for and against each other? Whether they could sue and take each other in execution? And many other questions will occur to every one, to which it will be impossible to give a satisfactory answer. For instance, it may be asked how it can be in the power of any persons by their private agreement to alter the character and condition which by law results from the state of marriage, while it subsists, and from thence to infer rights of action and legal responsibilities as consequences following from such alteration of character and condition? or how any power short of that of the Legislature can change that, which by the common law of the land is established as the course of judicial proceedings.

The argument in favor of the plaintiff rested on this position only, as a principle, viz, that where the husband ceases to be the protector of his wife, and is not liable to have any claim made on him for her support and maintenance, it necessarily follows that she herself must be her own protectress, make contracts for herself, and be responsible for them. But if this were a necessary consequence, it would hold in all cases: but that is not so; for if a woman should elope from her husband, withdraw herself from his protection, and live in adultery, he is not by law liable to answer for her necessities; and no case has decided that the woman is. A wife living apart from her husband, and who has property secured to her separate use, must apply that property to her support, as her occasions may call for it; and if those who know her condition instead of requiring immediate payment give credit to her, they have no greater reason to complain of not being able to sue her than others who have nothing to confide in but the honor of those they trust. From the incapacity of a married woman to contract or to possess personal property which may be the subject of contract men and their wives desirous of living separate have found it necessary to have recourse to the intervention of trustees, in whom the property, of which it is intended she shall have the disposition, may vest uncontrolled by the rights of the husband, and with whom he may contract for her benefit; but in such property the woman herself acquires no legal interest whatsoever. Of such trusts Courts of Equity alone can take notice; they can cause the fund to be brought before them to be applied as in justice it ought to be; and in those Courts the creditor must prefer his claim.

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The earliest cases on this subject proceed on the ground of the husband being considered as dead, and the woman as being in a state of widowhood, or as divorced à vinculo matrimonii, in which light *Rutton* and his wife do not stand. And until the cases of *Ringstead v. Lady Lanesborough*, *Barwell v. Brooks*, and some subsequent cases, which we wished to have re-considered, we find no authority in the books to shew that a man and his wife can by agreement between themselves change their legal capacities and characters; or that a woman may be sued as a feme sole while the relation of marriage subsists and she and her husband are living in this kingdom.

For these reasons our opinion, in conformity with that of all the Judges who heard the last argument, is, that there must be judgment for the defendant.

Judgment for the defendant.

His Lordship afterwards desired that it might be understood that the late Lord Chief Justice *Eyre*, who had heard the first argument, entirely concurred in this opinion.

Monday,
May 5th.

POTTS *against* BELL and Others; in Error.

Trading with an enemy without the king's licence is illegal. And it is illegal for a subject in time of war without the king's licence to bring even in a neutral ship goods from an enemy's port which were purchased by his agent resident in the enemy's country after the commencement of hostilities although it may not appear that they were purchased of an enemy.

UPON a writ of error brought from the Court of Common Pleas it appeared that *Bell* and others brought an action against *Potts* upon a policy of insurance on the ship *Elizabeth* and goods on board at and from *Rotterdam* to *Hull*, with liberty to touch and stay at any ports or places &c, and declared as for a loss of the goods loaded on board by capture by enemies. There were other counts for money had and received, and upon an account stated; to which the general issue was pleaded.

At the trial a verdict was found for the plaintiffs below; and a bill of exceptions was tendered and allowed on the part of the plaintiff in error, whereby it appeared that at the trial the plaintiffs below proved in evidence the policy of assurance in the declaration mentioned, subscribed by *Potts* and dated the 7th of *December* 1797; and that the policy was effected in *London* by *Barrett* and Company insurance brokers there by the orders and for the benefit and risk of the plaintiffs then and still being *British* merchants resident in *London* and interested in the goods insured to the value mentioned. That the ship *Elizabeth* was a neutral ship belonging to *H. Bannerman* and Son of *Greetsil* and *Emden* in *Prussia*, bound

on the voyage insured from *Rotterdam* to *Hull*; and that the clearance of the ship was ostensibly from *Rotterdam* to *Norden*, because the persons then exercising the powers of government in the United Provinces would not permit the ship to be cleared out from *Rotterdam* to *Hull* or any other port of *Great Britain*; and that the goods insured consisting of sixty casks of madders were laden on board the *Elizabeth* at *Rotterdam* to be conveyed from thence to *Hull* by one *Robert Twiss* then being the agent of the plaintiffs below and residing at *Rotterdam* by their orders and for their use, and were consigned by him to Messrs. *Hewson* and *Gunnes* at *Hull*, who then were the agents of the plaintiffs below, by their order and for their sole account and risk. That the ship *Elizabeth* having the goods insured on board afterwards on the 18th of *December* 1797 sailed from *Rotterdam* for *Hull*, and was captured on her voyage the next day by a *French* ship, an enemy to the King. Whereupon the counsel for the plaintiff in error, on his part, proved in evidence that the said sixty casks of madders before the lading of them on board the *Elizabeth* and before the policy was subscribed were purchased for the defendants in error by *Twiss* their agent resident at *Rotterdam*, in order to be sent from *Rotterdam* to *Hull* on their account and risk at *London*, and were afterwards laden on board the ship at *Rotterdam* for that purpose. That six bills of exchange were drawn by *Twiss* in payment for the madders at *Rotterdam*, but dated at *Hamburg*, upon the defendants in error, and which bills having been indorsed by the payees thereof respectively were afterwards duly accepted and paid by the said defendants in error in *London*. That before and at the time of the said purchase of the said sixty casks of madders by *Twiss*, and of the loading of them on board the *Elizabeth* in order to be conveyed from *Rotterdam* to *Hull* for and on account of the defendants in error, and also before and at the time that the plaintiff in error subscribed the policy of assurance thereon, and before and at the time of the ship's departure from *Rotterdam* towards *Hull* and of the capture of the said ship and madders as aforesaid, hostilities had commenced and still existed between *Great Britain* and the persons exercising the powers of government in the said United Provinces. That the plaintiff in error also proved the payment of the premium into court in this action. Whereupon the counsel for the plaintiff in error insisted at the trial that upon the matters so proved in evidence the plaintiffs below were not entitled to recover against him; that the policy upon the said

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madders was void, for that it is not lawful for *British* subjects to carry on trade with any nation which at the time is in a state of open war and hostilities with *Great Britain*, nor to purchase any goods in such nation and import them from thence to *Great Britain*. The bill of exceptions then stated the Judge's direction to the jury to find a verdict for the plaintiffs below, the finding of such verdict accordingly, and the assignment of errors thereon in the usual form.

This case was first argued in *Michaelmas* Term last.

Gibbs for the plaintiff in error. This is an illegal insurance, because it was made to protect the transportation of goods, purchased in an enemy's country, into this; and by the common law all trading with an enemy is illegal. It appears on the record that there was open war between this country and *Holland*; that during that time *Bell's* agent resident in the enemy's country purchased the goods in question for him there, which is direct trading with an enemy; and that *Bell* afterwards made the contract with *Potts*, on which this action was brought, in order to secure to himself the benefit of such illegal trading. But if the original act were unlawful, no subsequent contract for giving it effect can be supported in law. Trading with an enemy has always been deemed illegal in a subject, on account of the mischievous consequences which ensue from it. The intercourse which it creates between subjects of hostile states necessarily tends to facilitate the conveyance of intelligence to the enemy. The practice of granting licenses by the Crown for such an intercourse in particular cases from the earliest times down to the present shews strongly what the common law is in this respect. In addition to which there is a direct authority against the legality of such a trading, in 2 *Rol. Abr.* 173. pl. 3. (tit. Prerogative. L. Guerre); where trading with *Scotland* then in a state of general enmity with this kingdom was deemed illegal; but the merchants having acted under a license granted to them by the keepers of the truce were pardoned by the King. This was adverted to in the case of *Gift v. Mason* (a) by Lord *Mansfield*, who also mentioned another instance, where trading with an enemy was deemed unlawful, from a note given to him by Lord *Hardwicke* on a reference to all the Judges in the time of King *William III.*, whether it were a crime at common law to carry corn to an enemy, who were of opinion that it was a misdemeanour. Lord *Mansfield* also there said, that by the maritime law trading with an enemy is cause of confiscation in

(a) *Ante*, 1 vol. 84.

a subject. Upon the same principle it was holden illegal in the case of *Bristow v. Towers* (a) to insure an enemy's property. Now this is in effect the same thing; for the enemy gets the price of his goods; and he has equally the advantage of our market without any risk. Questions of this sort more frequently occur in the Courts of Admiralty, to which jurisdiction they properly belong; and there it is a settled maxim that trading with an enemy is cause of confiscation, if the vessel on board which the goods insured are loaded be captured by any of our cruizers and condemned. And such a condemnation, being a sentence in rem, would be conclusive evidence in the Courts of Common Law that the ship was engaged in an illegal traffic; as was ruled by Lord *Kenyon* in the case of *Nesbitt v. Whitmore* at the last Sittings at *Guildhall*. This Court then for the sake of consistency should be governed by the same law as they would have been if the vessel had been stopped at sea and brought in by our cruizers.

Wigley contra. It is by no means settled as a principle of law that all trading with an enemy is illegal, even supposing that the decision of that question would govern the present. The law makes express provision for the safety of the persons and property of foreign merchants belonging to an enemy's country resident here in time of war. 1 *Blac. Com.* 260. In *Henkle v. The Royal Exchange Assurance Company* (b) Lord *Hardwicke* said "It might be going too far to say that all trading with an enemy is unlawful; for the general doctrine would go a great way even where only *English* goods were exported, and none of the enemy's imported, which may be very beneficial." Lord *Mansfield* in *Gist v. Mason* (c) stated the doctrine very doubtfully and in terms which rather shew the leaning of his opinion to have been the other way. Much may depend upon the particular sort of trading. In time of war it is well known that certain articles are deemed contraband, even with respect to neutrals, such as furnish the enemy with the means of resistance or annoyance, namely, provisions, warlike stores, and the like. To trade with an enemy in such articles is undoubtedly illegal. The instance mentioned by Lord *Mansfield*, of supplying an enemy with corn, was evidently of this sort. What the trading was in the case mentioned in *Rolle's Abridgment* does not appear; possibly it was of the latter kind. But, at any rate, that case differs from this; for there our merchants went into the enemy's country to trade; and here the

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(a) *Ante*, 6 vol. 45.(b) 1 *Ves.* 320.(c) *Ante*, 1 vol. 84.

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trading was through the medium of neutrals. This distinction will also account for the granting of licenses by the Crown from time to time to trade with enemies; for a variety of articles have at different periods as circumstances varied been deemed to be contraband; in which case it never was disputed but that a license from the Crown was necessary for the protection of the trader. In *Brandon v. Nesbitt* (a), and *Bristow v. Towers* (b), the general question concerning the legality of trading with an enemy was much discussed at the bar; but nothing was decided upon that point. In the one, it was holden that no action could be maintained by an alien enemy; and in the other that an insurance of enemy's property was void. But neither of those decisions affects this question: and in *Bell v. Gilson* (c), arising out of the same transaction as the present, in the Common Pleas the Court held the insurance of goods purchased in an enemy's country to be legal. But even if a direct trading or intercourse with an enemy were illegal, it would not follow that the same rule would apply to a case like the present, where no direct personal intercourse took place, but the trading was through the medium of a neutral power. For this removes all objections on account of the impolicy of the measure, and indeed throws such arguments into the opposite scale. The goods insured are necessary to be had for the purpose of carrying on the manufactures of this country, which supply us with the resources for war. It must be admitted that it would have been legal to have purchased such a commodity from a neutral power, without any consideration of the country from whence the neutral had originally obtained it. Then it is much more advantageous for the subjects of this country to import the commodity directly in a neutral bottom from the country of its growth than to pay the additional profit which will accrue to the neutral from its passing first through his hands.

But in fact this is not a trading with an enemy; for at the time when these goods were purchased in *Holland* war had not been declared between the two countries, though letters of marque and reprisals had been granted. Hostilities, says Lord *Hale* (d), may exist without open war. So the King by his prerogative may in a declaration of war except certain of the enemy's subjects (e).

(a) *Ante*, 6 vol. 23.(b) *Ib.* 35.(c) 1 *Bos. & Pull.* 345.(d) 1 *Hale P. C.* 162.(e) 1 *Ld. Ray.* 283.

A declaration of war generally contains a prohibition to trade with the enemy, but a proclamation for marque and reprisals only does not; and it is only from the prohibition of the King by virtue of his prerogative that the illegality arises. It is not stated that the goods were purchased of an enemy, nor even in an enemy's country; but only that they were shipped from *Holland* under the circumstances before stated. The particular period when the goods were purchased is not mentioned; and this is the more material, because by the treaty before subsisting between *England* and *Holland* it was stipulated that in case of a war the subjects of either country respectively should have six months to retire to their own country with their property. This amounts to a license to the subject to bring away his property within that time. But at any rate the King's license obtained after the shipping of the goods was sufficient to legalize the whole adventure.

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He then argued upon the effect of several temporary acts of parliament, allowing the importation of *Dutch* property into this country about the period of this transaction: but the Court thought that those acts did not apply to a case like the present.

Gibbs in reply. The court will take notice of the existence of open war between this and any other country, if it be necessary, though it be not expressly so stated on the record. But it is sufficient to state, as here, that hostilities existed at the time, which is equivalent to open war. Here the original purchase of the goods was unlawful; and therefore this case is different from that of foreign merchants under the general law, and also from the case of those *Dutch* subjects who were to be protected by the temporary acts passed in consequence of the state of things in *Holland* at the time. It was not intended to bring these goods into *England* under the sanction of those acts. If this trade be beneficial to the country, either the legislature will legalize it, or the crown upon application will grant it's license for carrying it on; but that is a matter resting in the discretion of the King, upon which he ought to have the power of deciding in each particular instance. The distinction attempted to be taken between the case in *Rolle* and the present is not material; for the illegal act was considered to be the trading with the enemy, and not the mere going into the enemy's country; and so that case was considered by Lord Mansfield in *Gift v. Mason*.

In the course of the argument the counsel on both sides referred to some cases which had been decided at the Admiralty Court, and

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at the Cockpit: and this Court, considering that the subject was more frequently discussed there than in *Westminster* Hall, desired to hear a second argument by Civilians. Accordingly in *Hilary* Term last the case was argued by

Sir John Nicholl (a), the King's advocate, for the plaintiff in error. A subject of this country cannot trade with an enemy without the King's license; and under the circumstances stated in the special verdict, if these goods had been taken at sea by any of our cruizers, and brought into the Court of Prize, they must necessarily have been condemned as prize. This rule has been long settled, and is so undeniable that it is unnecessary to enter into the principles on which it is founded, which must now be presumed to be politic, wise, and just. Nor will it be necessary to enter into arguments to shew that there can be no distinction between policies of insurance and other contracts in this respect; for if trading with an enemy be illegal generally, it must be so in this particular instance; and every contract of indemnity against the risks attendant on such trading must also be illegal. There is no distinction between policies of insurance made to protect an adventure against the common law, and those against the law of the Admiralty, which equally forms a branch of the general jurisprudence of the kingdom. Neither is it important to discuss the policy of trading with an enemy for particular articles useful in manufactures, agriculture, or war; because the crown will in its discretion judge of each particular instance, and grant or refuse a license to trade accordingly. Nor is there any distinction, as to the question of prize, between a declaration of war generally and a proclamation for reprisals; the consequence would be the same in either case upon the question now before the Court. War puts every individual of the respective governments, as well as the governments themselves, into a state of hostility with each other. There is no such thing as a war for arms and a peace for commerce. In that state all treaties, civil contracts, and rights of property, are put an end to. *Vattel*, b. 3. c. 5. § 70. The same author (b. 3. c. 15. § 226.) shews that the principle of the law imposes a duty on every subject to attack the enemy and seize his property wherever found; though by custom this is restrained to those individuals only who have commissions for that purpose from their government. Now trading, which supposes the existence of civil contracts and relations, and a reference to courts of justice (b),

(a) *Friday, February 7th.*
Rob. Admir. Rep. 201.

(b) *Vide Bynk. b. 1. c. 7.*; and the case of *The Hoop*,

and

and the rights of property, is necessarily contradictory to a state of war. Besides, it is criminal in a subject to aid and comfort the enemy; and trading affords that aid and comfort in the most effectual manner, by enabling the merchants of the enemy's country to support their government. Export duties are to be paid when goods are brought from an enemy's country, which is furnishing the very sinews of war to the hostile government. These considerations apply with peculiar force to maritime states, where the principal object is to destroy the marine and commerce of the enemy in order to enforce them to peace. It may be said indeed that such a trading also benefits ourselves, especially if the balance of trade be in our favour. However it belongs not to individuals but to the state alone to balance these benefits; and such a power will best be exercised by granting licenses to particular persons, or as to particular commodities, according to the exigency of particular circumstances. For the same reasons a subject cannot trade with an enemy even from a neutral country, unless he has acquired a right of citizenship in that country; but certainly if he reside in this country he cannot so trade through the medium of a neutral agent. And à fortiori it is unlawful for him to do so where the trading, as in this case, is direct from the enemy's country to this. The above reasoning is further strengthened by this consideration, that if such direct trading were to be permitted, it would facilitate the means of carrying on a traitorous correspondence, which would greatly counterbalance any little advantage likely to accrue to the individual members of the community from such trading. Further, it has been the practice in all wars to obtain licenses from the crown for any direct intercourse with an enemy's country; and the same has been done during the present war. The Governor of *Jamaica* has power given to him to license trading with the *Spanish West India* settlements; which he has exercised accordingly. The Governor of *Gibraltar* has the same power with respect to *Spain*. The same has been at different periods of the war exercised by the government at home in regard to *Holland*. Now the very circumstance of granting such licenses from time to time shews that without them the trading with an enemy has always been considered illegal. The exception proves the general rule. It is not only the practice of this country thus to regulate the intercourse of its subjects with enemies, but the same general law prevails throughout Europe (a),

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(a) *Bynk. 2. J. P. b. 1. c. 3.*

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and has been acted upon in the present war by *France, Spain, and Holland*. This principle is also recognized in our own books. In the case of *Henkle v. The London Exchange Assurance Company* (a), the then Solicitor General (Lord *Mansfield*) admitted in argument that any trading with an enemy was a misdemeanor, and that by the Maritime law it was cause of confiscation. All the learning on this subject was fully examined and elucidated in a late case of *The Hoop* (b) by Sir *W. Scott*. It was there attempted to set up an exception to the general rule, that all trading with an enemy is illegal: but the universality of the rule was established; and in giving judgment the learned judge adverted to the principal leading authorities and cases on the subject. [He then read the following notes of cases, taken partly from the MSS. notes of Sir *Edward Simpson*, which are a valuable and authentic collection of Admiralty decisions; and partly from the printed Report by Dr. *Robinson* of the judgment delivered by Sir *W. Scott* in the case of *The Hoop* before referred to.]—"The case of *St. Philip* in 1747, at the *Cockpit* (c); Lord Ch. J. *Willes* being present. The Lords refused to give the claimants liberty to prove that goods which had been captured and condemned as prize were bought before the war; the Chief Justice being clearly of opinion that the effects of *British* subjects taken trading with the enemy are good prize."—This establishes the rule that trading with an enemy is subject of confiscation, and excludes any exception, even on the ground that the goods had been purchased before the war; à fortiori therefore if, as in this case, they were purchased after the commencement of hostilities.—"The case of *The Elizabeth* of *Ostend* (d) in 1749; present Sir *Thomas Dennison*, and either Mr. Justice *Birch* or Mr. Justice *Clive*. The cargo taken and condemned as coming from an enemy's port was claimed to be the property of *British* subjects. The Lords of Appeal by their sentence restored the goods claimed by *Gould* a *British* subject born, but established at the time in the dominions of the Queen of *Hungary*; but rejected the claim of *Henckell* and others who were then and still subjects of His Majesty. Sir *E. Simpson*'s note on the above case is, that the Lords condemned all the goods of *English* subjects, the judges being clearly of opinion that they

(a) This is reported in 1 *Ves* 317. but the King's advocate read a note of it from Sir *Thos. Seawell*'s brief.

(b) *Rob Adm. Rep.* 196.

(c) Sir *E. Simpson*'s MSS.

(d) *Ibid*: and also cited in 1 *Rob. Rep.* 202. though not so fully stated.

were prize of war, and confiscable. Also trading with an enemy was condemned by the Lords of Appeal in 1704. The same note also refers to several other instances of ships condemned on this account; amongst others, *The Mary of Wexford* in 1707 for trading to *Spain*.—" *The Ringende Jacob* in 1747 (a), a Swedish ship, went from *London* to *Bordeaux* and took in wine for British subjects to be delivered at *Guernsey*, but with false clearances at *Bordeaux*, in order to deceive the enemy. She was condemned by the Lords of Appeal on the 7th of *February* 1750, in affirmance of the judgment of the Admiralty court."—" The cargo of the *Lady Jane* (b), a *Hamburg* ship laden at *Malaga* with wine, was claimed by *English* merchants as the produce of goods sent to *Spain* before the war: but it was condemned by the Lords of Appeal, present Mr. Baron *Clarke*."—" The *Deergarden* of *Stockholm* (c) was laden with woollen goods shipped ostensibly at *Lisbon*, the voyage being in fact to *Bilboa* an enemy's port, but on British account; The cargo was condemned on the 15th of *March* 1747."—" The *Juffrouw Louisa Margaretha* (d), before the Lords the 3d of *April* 1781 (otherwise called *Escott's* case). This was a claim by Messrs. *Escott* and *Read* of *London* for wines &c. shipped on board a *Dutch* ship in 1780 at *Malaga* on their account. And it was stated that the house of *Escott* and *Read* had for twenty years before the preceding hostilities between *Great Britain* and *Spain* traded to and from *Malaga*, where they had an established house of trade and where Mr. *Escott* had resided for thirty years till the last ten months when he had resided in *England*; that a great quantity of wine belonging to the house had been left at *Malaga* till a favourable opportunity offered of sending it to *London*; that the destination was to *Offend*, and the property described to be for neutral account and risk in order to avoid the enemy's cruizers. The whole was therefore claimed as *British* property, subject to a per centage for commission to their foreign correspondent. But the judgment of the court of Admiralty rejecting the claim of Mr. *Escott* was affirmed by the Lords, present Lord *Loughborough* then Ch. J. of C. B. and Sir *J. Eardley Wilmot*."—" The *St. Louis*, alias *El Alleffandro* (e), (otherwise called *The New Orleans* case) before the Lords *July* 18th, 1781. This was a claim of Messrs. *Morgan* and *Mather* for certain peltries shipped by them on board a vessel of *New Orleans* bound to

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(a) Dr. Rob. Rep. 202.

(b) Ib.

(c) Ib.

(d) Dr. Rob. Rep. 203.

(e) Ib. 204.

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Bourdeaux, and consigned to merchants there on account of the shippers. It appeared that *Morgan* had left *England* and settled in *West Florida* in 1764. That, finding no protection from the *British* government to those settled on the Banks of the *Mississippi*, he had kept a ship as a floating storehouse from 1774, living himself at *New Orleans* by permission of the Governor on condition of not landing any goods in the *Spanish* territories. That in 1779 finding that the *American* troops were in such force on that river as to prevent any *English* ship from coming up, and that it was impossible to make any remittances to *England* but in neutral vessels, he shipped the goods in question on board the *St. Louis* a neutral ship, being the only vessel at *New Orleans* bound for *Europe*. That they were consigned to merchants at *Bourdeaux* to be there sold, and the proceeds remitted to *Mather* in *London*. And that he was obliged to resort to this mode of remittance that the goods might not perish on his hands. There was also a certificate from the *British* commander in those parts in *America*, certifying that Mr. *Morgan* a *British* subject had received permission under a capitulation with the enemy to convey himself and family to *London* under a passport from the *Spanish* Governor. Nevertheless the ship and property were condemned in the Admiralty court as enemy's property or otherwise liable to confiscation; and this sentence was confirmed by the Lords, present Lord *Loughborough* Ch. J. of C. B. But some of the same person's property sent in another ship from *New Orleans* consigned directly for *London* was restored."—" *The Compte de Wobronzoff* (a) before the Lords on the 19th of July 1781 (otherwise called the *Irish* case). This was a claim of *Daley* and other *Irish* merchants for the vessel and certain *French* wines shipped at *Bourdeaux* in May 1780 on their account, with ostensible papers for *Russia*; in support of which it was stated that during the whole war the Commissioners of Revenue and Excise in *Ireland* had constantly permitted such a trade to be carried on from *Bourdeaux* to *Dublin* in the same manner as before hostilities by *British* subjects on their account in *British* ships. That this was done openly, and regular entries made of the same, and the duties paid. That subsequent to hostilities an act passed the *Irish* legislature laying an additional duty on *French* wines imported from June 1780 to December 1781, which it was contended was a direct recognition of the legality of this traffic. Nevertheless the judgment of the court of Admiralty, condemning

(a) *Rob. Rep.* 205.

the ship and cargo as lawful prize, was affirmed; present Lord Bathurst and Lord Loughborough."—"The *Expedite Van Rotterdam* (a), (otherwise called the *Levant* case) before the lords 18th July 1782. This was a claim by Gregory and Turnbull of London for wine shipped on board a *Dutch* ship on the 20th of December 1780 at *Malaga* for them, though ostensibly for the account and risk of *Thomasze of Amsterdam* their agent, *Holland* being then at peace with this country. The claimants relied on an act of the 20. Geo. 3. permitting the product or manufacture of certain places within the *Levant* to be imported into *Great Britain* or *Ireland* in *British* or neutral vessels from any place whatsoever. But the Court of Admiralty, not thinking that the act referred to applied to this case, condemned the goods, which sentence was affirmed by the lords; present lord Camden and lord Ashburton."—"The *Bella Guadita* (b) (otherwise called the *Grenada* case), before the lords 20th July 1785. After the capture of *Grenada* by the *French* Mr. Vaughan and other *British* merchants sent a cargo of provisions on board a neutral ship from *Ireland* to *Grenada* intending to bring back in return plantation produce in payment of the debts owing from proprietors of estates in that island to *British* merchants. This traffic had been carried on between the conquered islands of *Great Britain* for some time before and till the then recent breaking out of hostilities with *Holland*, through the medium of *St. Eustatia* a *Dutch* colony, under the sanction of *British* acts of parliament. And after the *Dutch* hostilities an act passed, 20 Geo. 3. reciting the capture of *Grenada* by the *French*, and that it was expedient and just to relieve the proprietors of estates there, and enacting that no goods of the growth &c. of the island on board neutral vessels going to neutral ports should be liable to condemnation as prize. The judgment of the Vice Admiralty court of *Barbadoes* condemning the cargo as *French* property was affirmed; present Lord Camden."—"The *Elnigheid* (c), before the Lords 21st March 1795. There corn which was shipped on account of *British* and *Dutch* merchants on board a *Lubeck* ship from *Rotterdam* to *Nantes* before war declared by *France* against *England* and *Holland*, but which from accidental circumstances did not sail till afterwards, being taken, was adjudged good prize by the Court of Admiralty, and afterwards on appeal; present Sir R. P. Arden master of the rolls, and Eyre Lord C. J. of C. B."—"The *Fortuna*, before the Lords 27th

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of June 1795 (a). There a cargo of wines had been shipped by British merchants carrying on trade at Barcelona on board a Swedish vessel at Barcelona in January 1793 and destined for Calais. She was first captured by a Spanish frigate in April, and released by the Spanish court of admiralty; after which she was again captured by one of our cruisers. It was contended for the captors that the cargo was liable to confiscation, because the ship sailed from Spain for Calais subsequent to the commencement of hostilities by France against England and Spain, which it was incumbent on the proprietors to have prevented, or at least to have endeavoured to do so. The sentence of condemnation was affirmed."—"The *Freedon* (b) was a case of the same description as the last: but there the British merchants were permitted to produce evidence to shew that immediately after the breaking out of hostilities they had used their best endeavours to prevent being implicated in the illegal commerce on their account from Barcelona to Ostend; but failing in this the cargo was condemned in the Court of Admiralty, which sentence on appeal was affirmed; present the Master of the rolls."—"The *William* (c), before the Lords December 19th 1795. Prior to the war between France and Great Britain the claimants who were British subjects in Grenada were creditors of certain French merchants in Guadaloupe, and after the war broke out the agent of the claimants in Gaudaloupe received the cargo of sugars in question in payment of that debt, and shipped them on their account. The sentence of the vice admiralty court of St. Christopher condemning the ship and cargo was affirmed; present the Master of the rolls." Upon the authority of this long train of decisions the judgment in the principal case of the *Hoop* (d) proceeded. There Mr. Malcom of Glasgow and other Scotch merchants had traded to Holland for articles necessary for the agriculture and manufactures of that part of the country, for which they had several times before applied for and obtained the King's license; but after the passing of certain acts of parliament having upon application to the commissioners of the customs at Glasgow being informed (erroneously as it afterwards appeared,) that such licenses were no longer necessary, they had omitted to obtain one on that occasion, in consequence of which the cargo being taken was condemned as prize, on the general ground that all trading with an enemy without the King's license was illegal

(a) *Rob. Rep.* 212.(b) *Ib.* 213.(c) *Ib.* 214.(d) *Ib.* 196.

and cause of confiscation. These cases also shew that there is no distinction between trading with an enemy and with an enemy's country: nor is such a distinction warranted in principle; for all persons inhabiting an enemy's country are presumed to be enemies. Aid is equally given to the enemy by such trading, whether the goods be furnished immediately by an enemy or neutral merchant; and the danger of traitorous correspondence is the same.

Dr. Swabey, contra, admitted that, so far as the question of prize affected the decision of this case, the principles advanced and authorities cited on the part of the plaintiff in error by the King's advocate could not be disputed. But how far that concluded the question as to the legality of the insurance at common law, or whether the obtaining of a license from the crown prior to the capture would make any difference, he begged leave to refer to the arguments of the common lawyers on behalf of the defendants in error.

Curia adv. vult.

LORD KENYON Ch. J. now said that the Court had very fully considered the question immediately after the very learned argument which had been made by the King's advocate in the last Term. That the reasons which he had urged and the authorities he had cited were so many so uniform and so conclusive to shew that a *British* subject's trading with an enemy was illegal, that the question might be considered as finally at rest. That those authorities, it was true, were mostly drawn from the decisions of the Admiralty Courts: and that after all the diligence which had been used there was only one direct authority on the subject to be found in the common law books, and that one was to the same effect. But that the circumstance of there being that single case only was strong to shew that the point had not been since disputed, and that it might now be taken for granted that it was a principle of the common law that trading with an enemy without the King's license was illegal in British subjects. That it was therefore needless in this case to delay giving judgment for the sake of pronouncing the opinion of the Court in more formal terms; more especially as they could do little more than recapitulate the judgment with the long train of authorities, already to be found in the clearest terms in the printed report of the case of the *Hoop*, published by *Dr. Robinson*. That the consequence was that the judgment of the Court of Common Pleas must be reversed.

Per Curiam,

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Judgment reversed.

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May 16th.BIRD and Others *against* APPLETON.

If a ship be insured "at and from A. to B.," and there be any illegality in the traffic during her stay at A., the assured cannot recover on the policy for a loss happening between A. and B.

Goods may be insured, though purchased with the proceeds of a former illegal cargo.

An insurance on a ship for a particular voyage is legal, though she may have done some act in a former voyage for which she was liable to seizure.

A warranty of neutrality in a policy of assurance is not falsified by a sentence of a foreign court of Admiralty condemning a ship for navigating contrary to the ordinances of that belligerent state to which the neutral country had not assented.

THE first count in the declaration was on a policy of assurance on goods on board the "Confederacy" an American ship, "at and from Canton in China to Hamburg or Copenhagen, with liberty to touch stay and trade at all ports and places whatsoever, particularly a port in the channel," effected by the plaintiffs for the benefit and on the account of *Leffingwell* and another. The second count was on a policy on the ship *Confederacy* "at and from Canton," &c. as in the first count. It was stated that the ship sailed from Canton having the goods on board, and that she was taken as prize in the course of her voyage before her arrival at Hamburg or Copenhagen. The Defendant pleaded the general issue, and on the trial before Lord *Kenyon* a special verdict was found.

In the special verdict it was stated that the plaintiffs caused to be effected the two policies of assurance mentioned in the declaration for *Leffingwell* and another. That the ship "*Confederacy*" was an American built ship, the property of American subjects by whom she was sold in 1795 in the port of London to *Leffingwell* and another, also Americans. That the ship was afterwards loaded in and cleared out and sailed from London for Madeira, from whence she proceeded to the Isle of Bourbon and thence to Mauritius, at which places the greatest part of the cargo was disposed of; that from Mauritius she proceeded to Bombay, where she arrived in June 1796; that during all this time she was commanded by *S. Jencks* a citizen of the United States of America, "and was furnished with and had on board a proper passport duly made out and granted according to the form annexed to the treaty of commerce" between France and the United States of America. That during the time the ship was at Bombay the remainder of the cargo was landed and disposed of, and the captain obtained from the governor in council a license to load on board the *Confederacy* a cargo of cotton and to proceed with the same for sale from thence to Canton in China. That having taken on board such a cargo the captain sailed in the ship for Canton, and in his passage thither touched at the island of *Puloopinang*, where he took on board a quantity of tin for ballast of the value of 3500*l.*, and arrived at Canton in October 1796, where her cargo was sold and disposed of, and the goods mentioned in the first count in the declaration (the property

property of *Leffingwell* and another) were at *Canton* loaded and put on board to be carried from thence to *Hamburg*. That the proceeds of the cargo from *Bombay* to *China* were employed in the purchase of part of the cargo from *China* to *Europe*. That the voyage from *London* to *Canton* and the voyage from *Canton* to *Europe* were two voyages. That the ship sailed from *Canton* towards *Hamburg* with the goods on board in *January* 1797, and whilst she was on her voyage was captured by a *French* ship of war and carried into *Nantz*; where proceedings being instituted before the tribunal for determining questions of prize the ship and cargo were condemned as prize. [The sentence of condemnation was set forth at length in the special verdict; but it is omitted here because this Court considered that the condemnation proceeded entirely on the ground that the ship had violated some of the *French* ordinances.] It then stated that in the treaty between this country and *America*, referred to in the stat. 37 *Geo.* 3. c. 97., the following article is contained; "His Majesty consents that the vessels belonging to the citizens of the United States of *America* shall be admitted and hospitably received in all the sea ports and harbours of the *British* territories in the *East Indies*; and that the citizens of the said United States may freely carry on a trade between the said territories and the said United States in all articles of which the importation or exportation respectively to or from the said territories shall not be entirely prohibited; provided only that it shall not be lawful for them in any time of war between the *British* Government and any other power or state whatever to export from the said territories without the special permission of the *British* Government there any military or naval stores or rice. The citizens of the United States shall pay for their vessels when admitted into the said ports no other or higher tonnage duty than shall be payable on *British* vessels when admitted into the ports of the United States; and they shall pay no other or higher duties or charges on the importation or exportation of the cargoes of the said vessels than shall be payable on the same articles when imported or exported in *British* vessels: but it is expressly agreed that the vessels of the United States shall not carry any of the articles exported by them from the said *British* territories to any port or place, except to some port or place in *America* where the same shall be unladen, and such regulations shall be adopted by both parties as shall from time to time be found necessary to enforce the due and faithful observance of this stipulation. It is also understood that the permission

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granted by this article is not to extend to allow the vessels of the United States to carry on any part of the coasting trade of the *British* territories, but vessels going with their original cargoes or part thereof from one port of discharge to another are not to be considered as carrying on the coasting trade; neither is this article to be construed to allow the citizens of the said states to settle or reside within the said territories, or to go into the interior parts thereof without the permission of the *British* Government established there. And if any transgression shall be attempted against the regulations of the the *British* Government in this respect, the observance of the same shall and may be enforced against the citizens of *America* in the same manner as against *British* subjects or others transgressing the same rule. And the citizens of the United States whenever they arrive in any port or harbour in the said territories, or if they should be permitted in manner aforesaid to go to any other place therein, shall always be subject to the laws government and jurisdiction of whatever nature established in such harbour port or place according as the same may be. The citizens of the United States may also touch for refreshment at the island of *St. Helena*, but subject in all respects to such regulations as the *British* Government may from time to time establish there." The verdict concluded with praying the advice of the Court, assessing the damages separately on the two counts, in case the Court should be of opinion that the plaintiffs were entitled to recover upon either of them.

This case had been before the Court several times before on a motion for a new trial and afterwards on a special verdict: after the former special verdict had been argued a venire de novo was awarded, because damages were given generally on both the counts in the declaration, and the Court intimated an opinion that though the plaintiffs might recover on one count they were not entitled to recover on the other. Accordingly the case went to another jury, when the present verdict was found, differing from the former in several particulars, but principally in these, that in this verdict the damages were separately assessed on the different counts, and it was now stated that the voyage from *London* to *Canton* and that from *Canton* to *Europe* were two distinct voyages. This verdict was now argued by *Law* for the plaintiffs and *Adam* for the defendant.

The second count, on the policy on the ship, was now abandoned by the plaintiffs' counsel, on this ground, that as the policy on the ship attached "*at and from Canton*," including the period

of time when the cotton taken in at *Bombay* (an illegal cargo, being in contravention of the treaty between this country and *America*,) was still on board, and as the immediate voyage and adventure insured could not be divided into parts, the whole must be deemed an illegal adventure.

But on the first policy, that respecting the goods, several questions were made. It was objected on the part of the defendant that the plaintiffs could not recover on this count; 1st, Because the goods insured were purchased with the proceeds of an illegal cargo, that procured at *Bombay*, (it being admitted that the governor's license to purchase it was illegal,) and that such an adventure was contaminated by such antecedent illegal traffic. 2dly, Because the voyage from *Bombay* to *Canton* was only a part of a larger voyage, out and home from *London* to *Canton* and from *Canton* to *Europe*; and that as the ship in the course of the voyage traded at *Bombay*, contrary to the treaty between this country and *The United States of America* by not returning directly (a) from *Bombay* to *America*, the whole voyage was illegal. 3dly, Because the ship was seizable for a violation of the navigation act in a prior part of the voyage, from *Bombay* to *Canton*, and consequently that the goods insured were not put on board a proper ship, such an one as the assured impliedly undertook to provide; and that the right of seizure continued at least during the time that the ship was on the high seas and until her return home. 4thly, Because the sentence of condemnation by the tribunal at *Nantz* negatived the ship being an *American*.

On the part of the plaintiffs it was answered, 1st, that it was perfectly immaterial in this case to consider how the funds were acquired with which the cargo insured was purchased; it being sufficient for the purpose of this question that the cargo when bought was meant to be conveyed in the course of a legal voyage. 2dly, That the fact, on which this objection was founded, was negatived by the verdict, where it was expressly stated that these were two distinct voyages; and consequently that the homeward voyage from *Canton* to *Europe* could not be affected by any illegality in the voyage outwards. 3dly, That the circumstance of the ship having been liable to seizure for an act done before the commencement of the voyage insured could not affect this policy; for that the ship could only be seized *flagrante delicto*, during the same voyage, otherwise she could never afterwards be legally in-

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insured; and that the seizure of the ship for an antecedent cause of forfeiture was not within the scope of the indemnity of the underwriters, as they are only liable for risks incurred during the voyage insured. *Lockyer v. Offley*; ante, 1 vol. 252. 4thly, That it appeared by the concluding part of the sentence that the ship and cargo were condemned for having violated some of the *French* ordinances which were not obligatory on the *Americans*, and consequently that this sentence did not negative the ship being an *American*. *Pollard v. Bell*, ante, 434.

LORD KENYON C. J. Although this case has only been argued once on this special verdict, yet as the question has been so frequently canvassed of late, we have had an opportunity of considering it; and as the parties may expect not to be kept longer in suspense, we will dispose of the case now. It is now admitted by the counsel for the plaintiffs, and very properly so, that the policy on the ship must be abandoned, because during part of the time that the parties intended that the policy should attach, namely, while the ship was at *Canton*, there was something illegal in the transaction. Therefore we are now delivered from all consideration respecting that part of the case.

With regard to the other part of the plaintiffs' claim on the policy on the goods, the arguments urged by the defendant's counsel have not convinced me that this contract is illegal, because the goods insured were procured with the proceeds of a former illegal cargo. If this objection were well founded, it would go to an alarming extent; in deciding on a claim made on a policy of insurance, it would be necessary to examine and scrutinize the past conduct of the assured in order to see whether or not by their former transactions in life they had illegally acquired the funds with which the particular goods insured were purchased. But we cannot enter into considerations of that kind; we must confine ourselves to the immediate transaction before us. And whatever my former opinion may have been on the facts of this case, the jury have relieved us from one consideration, by finding expressly as a fact that these were not two connected parts of one voyage, but that the voyage homewards from *Canton* was a separate and distinct voyage from that to *Canton*; the homeward voyage therefore cannot be affected by the former outward voyage. The case of *Pollard v. Bell*, that has been alluded to in the argument, was decided by us after great consideration; and though that case could not be reconsidered by a court of error as the facts did not appear on the record, fortunately for ourselves as well as for

for the parties here there is a mode by which our judgment in this case, if erroneous, may be corrected, and the defendant if he be dissatisfied with the grounds of our decision in *Pollard v. Bell* will have an opportunity of canvassing that decision by bringing a writ of error in this case. But after the greatest attention that I have been able to bestow on the subject, I adhere to the opinion that we gave in that case; and that decision is directly in point to the present case. It was there established as a proposition, that the judgments of the Courts of Admiralty are to proceed on the known jus gentium or on the treaties between particular states; that such treaties do not alter the jus gentium with respect to the rest of the world, but as between those particular states they are considered as engrafted on the jus gentium; and that one state has no authority by any ordinance of its own to vary the general law of nations as to other states. Then what is the ground on which this sentence of condemnation proceeded; unquestionably a violation of the *French* ordinances only. At first I was struck with one of the considerations mentioned in the sentence, respecting the passport; "Considering that so far from derogating from this general regulation for all nations in favor of the *Anglo Americans* by the treaty of the 6th of *February* 1778 this treaty implicitly subjects them to it by the 25th and 27th articles, which oblige them to conform to the model of the passport annexed to the treaty." But that was conformed to; for it is expressly found by the special verdict that "the ship was furnished with and had on board a proper passport duly made out and granted according to the form annexed to the treaty of commerce between *France* and *The United States of America*." And after attentively considering the whole of the sentence of condemnation, it appears to me beyond all controversy that the ground on which it proceeded is that which is mentioned in the concluding part of the sentence; "The tribunal, in conformity to the above mentioned laws (a) and regulations, and particularly of the decree of the executive directory of the 12th *Ventose* 5th year, adjudges and declares the validity of the prize of the foreign ship, *The Confederacy*, Captain *Scott Jencks*, captured by the privateer *Duguai Trouin*, captain *Dutache*, as also of all her appurtenances and dependencies tackle apparel and utensils; adjudges and declares likewise the validity of the prize of all the goods and effects composing the lading or cargo of the said

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(a) Which by a reference to a former part of the sentence appear to be those of | 3d. *Brumaire*, 4th year; and 26 *July* 1778.

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ship *The Confederacy*, in default of Captain Jencks and the supercargo Pierpont being regular in their list of crew and their dispatches." Now that is neither required by the law of nations or by the treaty between *France* and the United States of *America*; and it is found by the verdict that all the requisites of that treaty were complied with. The foreign court thought that they had a right to impose something on an independent nation beyond what is required by the law of nations or by the treaty entered into by that independent nation: but that certainly is not obligatory on such nation. Therefore, in conformity with the decision in the case of *Pollard v. Bell*, I think I am bound to conclude that the plaintiffs are entitled to recover on the policy of insurance on the cargo; and that on the other count, on the policy on the ship, the judgment must be for the defendant.

GROSE J. The plaintiffs have now given up their claim on the policy respecting the ship. And the defendant has attempted to impeach the policy on the cargo, first, on the ground that the goods insured were purchased with the proceeds of a former illicit cargo; and, secondly, on the ground that the foreign sentence is conclusive as to the fact that this was not an *American* ship. With regard to the first point; arguments *ab inconvenienti* are alone sufficient to determine it. If we were to decide that such a cargo could not be insured, it would be difficult to say to what consequences it would lead; the principle of that decision would equally extend to the second, nay to the hundredth, cargo purchased afterwards, and to the ship itself, so that such a ship never could afterwards become the subject of a legal insurance even in the hands of subsequent purchasers. I know of no principle of law to warrant such a doctrine; and I think that we ought not to establish so inconvenient and absurd a rule. Then it remains to be considered whether or not the case of *Pollard v. Bell* were properly decided, and if it were, whether it ought not to govern the present case. I have heard no arguments to induce me to think that we judged erroneously in determining that case, and it appears to me to be a direct authority for the present. Though the foreign sentence is drawn in an inaccurate and rather a confused manner, I think that the condemnation proceeded solely on the ground that the ship in question had violated some of the *French* ordinances, and not because she had infringed the law of nations or the particular treaties that subsisted between *France* and *America*. Therefore, without repeating the reasons given in the case of *Pollard v.*

Bell, I think that the decision must govern us in determining this case.

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LAWRENCE J. It has been contended on the part of the defendant that the plaintiffs cannot recover on the policy on the goods, which are the subject of this insurance, because they were bought with the proceeds of an illegal cargo, and because the ship on board which the goods in question were put having violated the treaty by trading from *Bombay* to *Canton* was liable to be seized, and further because the ground of the sentence of condemnation was not for having violated any of the *French* ordinances merely but for an infraction of the treaty between *France* and *America* the propriety of which sentence we cannot examine. With regard to the first of these objections; in such a case as the present we cannot inquire into the means by which the merchant gains the money that is afterwards laid out in the purchase of goods; if the money were obtained by robbery on the highway and invested in the purchase of a cargo, I do not know why that cargo may not be legally insured. In order to render the insurance illegal, the illegality should exist during the course of the voyage insured. Nor do I think that the next objection, that the plaintiffs cannot recover because the ship was liable to seizure, is well founded. Here the illegality commenced by the captain *taking on board a cargo at Bombay* in order to carry it to *Canton* for sale. But the doctrine relied upon by the defendant is perfectly new, that the assured cannot recover on the policy against the underwriters because the ship in a prior voyage had been guilty of some transgression for which she was liable to be seized. That is not a risk within the policy; if the ship had been seized for this cause during the voyage insured the underwriters would not have been liable; they are only liable for risks in the course of the voyage insured. Then the only remaining question is, whether or not it were decided by the foreign sentence that the ship was not an *American*. It was determined in the case of *Pollard v. Bell* that a sentence of condemnation for violating the ordinances of one nation, not adopted by the treaty between that nation and the country of which the owner of the property insured is a subject, will not prevent the assured recovering on the policy on the ground that such sentence negatives the warranty of neutrality. But the attempt on the part of the defendant here is not so much to dispute the authority of that case as its application to the case before us. However I am of opinion that on the whole we must consider that

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the foundation of this sentence of condemnation was the violation of *French* ordinances only, and consequently that the case of *Pollard v. Bell* is a direct authority for the present.

LE BLANC J. It is insisted that the plaintiffs are not entitled to recover for the goods insured, first, on the ground that the homeward cargo from *Canton* to *Europe* was in part purchased with the proceeds of the goods sold at *Canton*, and secondly, on the ground that the ship was liable to seizure on her homeward bound voyage because she had before been trading illegally. But I cannot assent to the doctrine, that we must inquire how the money was procured with which the cargo insured was purchased, in order to see whether or not the underwriters be liable on their contract of insurance. According to that doctrine, it would be necessary to trace the money through the various channels in which it may have passed before it got into the pocket of the merchant before we could decide whether or not a subsequent contract of insurance on goods purchased with such money were legal. But such a proposition cannot be supported in a court of law. With regard to the other ground of defence; I do not think that the right of the assured to recover on this policy is impeached because the ship in part of another voyage, which is found by the special verdict to be a distinct voyage from the one in question, was engaged in an illegal traffic. If the ship had been seized in the course of the former illegal voyage, the underwriters might then have said that they had not indemnified the owners against such a risk: but no such illegality did exist during any part of this voyage. Then it only remains to be considered whether or not the warranty that the ship was an *American* is negatived by the sentence of condemnation. We must look to the concluding part of this sentence to see the grounds on which the foreign court professed to decide. If that determination had been founded either on the law of nations or on the treaty subsisting between *France* and *America*, we could not have inquired whether or not that Court had formed a right decision. But if we see that that Court condemned the ship and cargo neither on the law of nations or on the treaty between *America* and *France*, then we are bound to declare that such a sentence is not conclusive on the parties to this action: it does not affect the question respecting the warranty of neutrality. And I think that the sentence is founded simply on an infringement of the *French* ordinances which are particularly pointed out in the sentence, and not on any breach of the law of nations or of

the treaty between *France* and *America*. For these reasons therefore I concur in the opinion given by the rest of the Court that the plaintiffs are entitled to recover on the policy on the goods.

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Per Curiam, Judgment for the plaintiffs on the first count, and for the defendant on the second.

E. P. BANFILL Junior *against* LEIGH and JEFFRAY.

Friday,
May 16th.

THIS was an action upon promises. The declaration stated that divers differences and disputes having arisen between *E. P. Banfill* senior (the plaintiff's father) and *Geaves*, who transacted business in *Newfoundland* under the firm of *Geaves* and Company, as commission agents for the defendants, and the defendants, relative to the adjustment of their accounts, by indenture dated the 8th of *April* 1797 *E. P. Banfill* senior and *Geaves* assigned to the plaintiff all debts due to the estate of *Geaves* and Co. upon the several trusts therein mentioned, and appointed the plaintiff their attorney for receiving and compounding for those debts; that on the 19th of *June* 1799 it was agreed between the plaintiff and the defendants that the matters in difference then subsisting between *E. P. Banfill* senior and *Geaves* and the defendants should be submitted to the award of *Newman* and *Ongier*, and that the plaintiff "for and on behalf and as the attorney of *E. P. Banfill* senior and *Geaves* on his part" and the defendants on their parts would perform the award, so as it were made on or before the 1st of *August* then next; "and that all the porter belonging to the defendants which was left unaccounted for in *Newfoundland* by *Geaves* and Co. should be taken and paid for by them or allowed to be set off in account against *Geaves* and Co. at the prime cost" &c. The declaration then stated mutual promises by the plaintiff and the defendants to perform the award; that on the first of *August* 1799 the arbitrators made their award in writing "concerning the matter submitted to them as aforesaid," and awarded that there was then due from the defendants to the plaintiff "as the attorney or assignee of *E. P. Banfill* senior and *Geaves* as aforesaid $\$317. 19s. 6d.$ ", and that the defendants should pay that sum to the

A. and B. in 1797 assigned to the plaintiff all debts due to them, and gave him a power of attorney to receive and compound for the same, under which the plaintiff in 1799 submitted to arbitration the matters in difference then subsisting between his principals and the defendants, and the plaintiff and defendants promised to each other to perform the award. The arbitrators having awarded a sum to be paid to the plaintiff as such attorney, he may maintain an action for it in his own name. The Court will not presume that the matters in difference submitted to arbitration arose subse-

quent to the indenture of assignment and power of attorney from the principals to the plaintiff: but such matter may be pleaded by way of defence to the action. It is not necessary for the plaintiff in setting forth the assignment to him from his principals (by virtue of which he was authorized to submit their demands to arbitration) to make a profert of the same in his declaration.

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plaintiff "in full discharge of all debts and sums of money due from the defendants to *E. P. Banfill* senior and *Geaves* on any account whatever;" which sum the arbitrators directed should be paid by the plaintiff's drawing a bill of exchange on the defendants for its amount payable two months after date; it then stated that the plaintiff accordingly drew such a bill, but that the defendants refused to accept it.

To this declaration the defendants demurred, and assigned for causes of demurrer that the plaintiff had not made any profert of the indenture mentioned in the declaration; that it did not appear that the matters in difference referred to arbitration related to or were connected with any debts assigned by that deed; or that the plaintiff had any concern or interest in the said matters in difference, or had any authority to agree that they should be referred or to bind *E. P. Banfill* senior and *Geaves* by a submission thereof; that the supposed causes of action being choses in action could not be assigned to the plaintiff so as to enable him to support the action in his own name; and that as it appeared by the declaration that the plaintiff did not enter into the submission on his own account and did not bind himself in his own right to undertake for the performance of the said award by *E. P. Banfill* senior and *Geaves*, there was no adequate consideration for supporting the promises in the declaration.

Wigley and *Giles* (a) in support of the demurrer. 1st, There should have been a profert of the indenture of the 8th of *April* 1787 mentioned in the declaration; which is necessary where the party pleading derives a title or interest under the deed (b), though where it is only pleaded by way of inducement it is otherwise. Here the power of attorney by which *Banfill* senior and *Geaves* assigned all debts due to them to the plaintiff is the very foundation of the plaintiff's title to recover. 2dly, Supposing the plaintiff to have no other claim than as attorney to those persons, the reference to arbitration under such an authority should have been in the names of his principals, and the action should have been brought in their names and not in his own. *Combe's case*, 9 Co. 76. *Brown v. Meverell*, Bendl. 107. Dy. 216. b. *D'Abbridg-court v. Ashley*, Moor 818. The debts of the principals, being choses in action, could not be assigned to the plaintiff so as to enable him to sue for them in his own name and right. So a

(a) The defendants appeared by different attorneys and severally demurred; therefore

each was heard by counsel.

(b) *Dr. Leyfield's case*, 10 Co. 92.

submission to an award by an attorney for another will only bind the attorney himself but not his principal. There is therefore no mutuality in this case; for though the defendants are ordered to pay the sum of money to the plaintiff in discharge of their debt to *Banfill* the father and *Geaves*, yet the defendants have no remedy against them upon this award, they not being parties to it. *Bacon v. Dubany*, *Salk.* 70. 3dly, the indenture of assignment to the plaintiff of the debts owing to his principals is dated the 8th of *April* 1797, and the reference to arbitration was not until the 19th of *June* 1799, and is of matters in difference then subsisting between the principals and the defendants; now non constat that the matters in difference then subsisting existed in *April* 1797, and if not, the plaintiff had no authority to bind his principals. Even if any part of the sum awarded were for a debt arising subsequent to *April* 1797, the award being of one entire sum is void for the whole and cannot be apportioned. 4thly, the assignment to the plaintiff is only of money due to the principals, and the submission to the award includes the account for porter belonging to the defendants, which is an excess of authority that vitiates the whole award, inasmuch as it does not appear how much was allowed on that account, and the sum awarded cannot be apportioned.

Parke contra was stopped by the Court.

Lord KENYON Ch. J. There is no doubt on which side of this case the justice lies; and I am glad to find that there is no foundation for either of the objections taken by the defendants. With regard to the first; it is not universally true that a profert must be made when the party pleading a deed derives title under it. It is not necessary where a conveyance to uses (a) or a feoffment is pleaded; I only mention these two instances to shew that it is not an universal rule; others might be produced. But it never is necessary to make a profert of a deed which is pleaded only by way of inducement; and the deed in question is only inducement to the action. As little foundation is there for the last objection, respecting the porter; the porter was not a subject of this reference, but it was to be taken by *Geaves* and Co. at the time. As to the principal question; I admit that it must appear that the arbitrators only adjudged those matters that were submitted to their adjudication. It is supposed however that these arbitrators acted upon matters beyond their authority, because the assignment

(a) Vid. *Carib.* 316. *Dy.* 277. *Cro.* 377. *Cro. Car.* 441. 2 *Rel. Abr.* 31. *Jac* 217. *Noy.* 135, 145. *Sir. W. Jon.* and 1 *Vez.* 393, 4.

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and power to refer took place in 1797, and the reference was not until the year 1799 of matters *then* subsisting: but it appears that the plaintiff for and on the behalf and as the attorney of *Banfill and Geaves* agreed to the reference, therefore we must look back to the time when he was appointed such attorney, and that was in 1797; so that it does not appear to me that the award is bad upon that ground. And upon the whole I see no reason why the justice of the case, which is with the plaintiff, should not take place.

GROSE J. On the principal question, it is sufficient to observe that the arbitrators awarded that a certain sum was due from the defendants to the plaintiff *as the attorney or assignee of Banfill and Geaves*; therefore it appears on the award itself that the arbitrators only took into their consideration the differences subsisting in the year 1797 when the assignment was made.

LAWRENCE J. Several objections have been taken on the part of the defendants. First, it is said that the plaintiff should have made a profert of the deed of assignment in *April* 1797. But it is clear that no profert need be made of a deed that is only inducement to the action. "If the deed pleaded be only in the inducement to the action or bar, it need not be shewn to the Court; as in a suit in the Exchequer by the King's Farmer, he need not shew the deed whereby he is farmer; for it is collateral to the action." *Com. Dig. Pleader. O 15. cit. 6 Co. 38. b.* "So in an action on the statute 2 *Edw. 6. c. 13.* if the plaintiff declare that the King granted titles by letters patent to A. for life, who leased to the plaintiff for years, he need not shew to the Court the letters patent, which are only conveyance to the action." *Ib. cit. 2. Cro. Jac. 70.* Then it was objected that the plaintiff, acting only as the attorney of *Banfill and Geaves*, could not refer these matters in the mode in which he has referred them: but it must be remembered that in this case the whole equitable interest was assigned to the attorney, and he having such interest agreed to refer the whole to arbitration; therefore this is not like the case where a person is acting merely in the character of attorney for another, and the cases cited for this purpose are not applicable to the present case. To be sure when a chose in action is assigned, the assignee must sue in the name of the assignor: but in this case the plaintiff is suing for himself. The objection respecting the porter is not founded in fact: the supposed difficulty has arisen from not considering to whom the porter belonged; it belonged to the defendants and not

to *Banfill* and *Geaves*; it could not pass by the assignment to the plaintiff, nor was it the subject of the reference; but it was to be taken by *Geaves* and Co. as part of the agreement to refer, and at the time of referring, the other matters in difference. With regard to the other objection; the question is whether or not we must take it that the arbitrators have decided on matters not included in the deed of assignment on which the plaintiff's authority to refer is founded. This was a general submission in the year 1799 of all matters in difference between these parties at that time; the deed of assignment was in 1797; and it is said that we may intend that the differences that had existed in the year 1797 were at an end, and that other disputes had arisen in 1799 when the reference was made: but if that were so, it should have been pleaded by the defendants. In *Simon v. Gavill*, *Salk.* 74. The submission was of all controversies pending; the arbitrator awarded that all suits *now* pending between the parties should cease, and that the defendant should pay 10*l.* in full of all demands and release all demands till the time of the award: the Court held that an award of a general release of all demands till the time of the award is good, for nothing new shall be intended to arise in the mean time; "and if any new controversy had happened, which is not to be intended, he that pretends to excuse the non-performance ought by his pleading to set it forth and shew it." So in this case if new differences had arisen between the date of the assignment and the time of the reference, it should have been shewn by the defendants by their plea.

LE BLANC J. of the same opinion.

Judgment for the plaintiff.

HOWSON *against* HANCOCK.

Saturday,
May 17th.

IN assumpsit for money had and received it appeared that the plaintiff and the defendant had laid two wagers, the one of 10*l.* and the other of 3*l.* 16*s.* on the event of a horse-race prohibited by the statute 10 *Geo.* 2. c. 19. *§.* 2. and deposited the money in the hands of certain stakeholders. The event having terminated in favour of the defendant both sums were paid over to him, the first by the express direction of the plaintiff, the latter (as the jury found) with his concurrence; and the present action was brought to recover back those sums from the defendant. It was insisted at

Where money deposited upon an illegal wager has been paid over to the winner by the consent of the loser, the latter cannot afterwards maintain an action against the former to recover back his deposit.

the

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the trial (a), on the part of the defendant, that as the wager had been fairly won, and as the money had been paid to him with the consent of the plaintiff the latter could not recover it back in this action; and Mr. Baron *Chambre* being of this opinion nonsuited the plaintiff, with leave to him to move to set aside the nonsuit and to enter a verdict for 13 l. 16 s. if this Court should be of opinion that he was entitled to recover. A rule nisi having been obtained for this purpose on a former day,

Dayrell and *Parke* now shewed cause against it. This case is distinguishable from that of *Lacaufrage v. White* (b), on the authority of which the rule was obtained. There indeed the plaintiff recovered back the original deposit money which had been paid upon an illegal wager after the event had been decided against him; but in that case he had done no act to shew his confirmation of the illegal contract. And there the Court referred to the case of *Cotton v. Thurland* (c), where in an action against the stakeholder to recover the deposit money stress was laid upon the circumstance that notice had been given by the loser not to pay before the sum was paid over to the winner. But here the money deposited was paid over to the defendant with the consent of the plaintiff, and then the maxim of law applies *potior est conditio possidentis*. In *Bull. Ni. Pri.* 131. it is laid down as a rule, that where one knowingly pays money upon an illegal consideration he is *particeps criminis*; and there is no reason why he should have his money again if he parted with it freely; for *volenti non fit injuria*. In *Tenant v. Elliott* (d) it was considered that an agent to whom money was paid upon an illegal contract for the use of another could not retain it as against the person for whose use he had received it, the party by whom it had been paid not objecting to the other's receiving it. And *Buller J.* there said "Is the man who *has paid* over money to the use of another to dispute the legality of the original consideration; having once waved the legality, the money shall never come back into his hands again." The case of *Farmer v. Russell* (e) went on the same principle as the last mentioned case; and *Eyre Ch. J.*, referring to what had been there said by *Buller J.*, observed "It was well said by my brother *Buller* that even the man who had paid over money to another's use could not dispute the legality of the original consideration."

(a) At the last assizes at Nottingham.

(b) Ante, 7 vol. 535.

(c) Ante, 5 vol. 405.

(d) 1 *Bos. and Pull* 3.

(e) *Ib.* 298.

Clarke and *Reader* in support of the rule. The two last cited cases do not apply, because the defendants there had received the money merely as servants to the principals, and therefore were not at liberty to dispute that they had received it to their use. But this is a question between the parties themselves to the illegal contract, and therefore either of them is at liberty to dispute the consideration at any time. In *Lacauffade v. White* (a) it was contended that however the illegal contract might be vacated and the deposit money recovered back at any time before the event happened, yet it was not competent for either party first to take the chance of success, and after the event was decided against him then to rescind the contract and recover back what he had before deposited: but the Court held that it was more consonant to sound policy and justice to permit the money paid upon an illegal consideration to be recovered back, even after the event was determined, than by denying the remedy to give effect to the illegal contract. Where the consideration is illegal, it is no objection to the plaintiff's right to recover that the money has been paid over to the other party, as was holden in *Smith v. Bromley* (b). There money had been advanced by the plaintiff to an agent to obtain the signature of a creditor to a bankrupt's certificate, which was paid over to the creditor. The Court held, that though no action would lie to recover it back from the agent of the creditor who had paid it over to his principal without notice, yet that it might be recovered back from the creditor himself.

Lord KENYON Ch. J. The ground on which the action was maintained in the lastmentioned case was that the money had been paid under a species of duress and oppression, and the parties were not in *pari delicto*. But there is no case to be found where when money has been actually paid by one of two parties to the other upon an illegal contract, both being *participes criminis*, an action has been maintained to recover it back again. And the authorities which have been referred to of the two learned Judges in the Court of Common Pleas are in favour of the defendant's right to retain the money so paid. Here the money was not paid on an immoral, though on an illegal, consideration. And though the law would not have enforced the payment of it, yet having been paid, it is not against conscience for the defendant to retain it. This is very different from the case of *Lacauffade v. White*, where

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(a) *Ante*, 7 vol. 535.(b) *Dougl.* 696. n.

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the money was recovered from the stakeholder before it had been paid over.

LAWRENCE J. In the case of *Smith v. Bromley* Lord Mansfield said that, where both parties are equally criminal against the general laws of public policy, the rule is *potior est conditio defendentis*.

Per curiam,

Rule discharged.

Saturday,
May 17th.

HANDS against SLANEY.

An infant, a captain in the army, is liable to pay for a livery ordered for his servant, as necessaries, but not for cockades ordered for the soldiers of his company.

ON the trial of this action for goods sold and delivered before Mr. Baron *Chambre* at the last assizes at *Warwick*, it appeared that the goods in question were a livery for the defendant's servant, who was a captain in the army, and cockades for some of the soldiers belonging to his company, which were furnished by the defendant at the plaintiff's request. The defendant, who was a minor, relied upon his infancy, insisting that the goods in question were not within the description of necessaries; for which only he was liable. But the learned Judge left it to the jury to consider whether the livery for a servant were not necessary and suitable to the plaintiff's degree, and the cockades a necessary expence incidental to his situation; and the jury, being of opinion that they were, found a verdict for the plaintiff.

Clarke and *Reader* on a former day obtained a rule calling upon the plaintiff to shew cause why there should not be a new trial, which rule they were now required to support. They said that the only cases in which actions had been maintained against an infant were for necessaries either for himself or his wife (a), but none had gone the length of deciding that he was liable for the maintenance or clothing of a servant; nor was it necessary that the plaintiff should have had a servant. Much less can he be liable for cockades under the description of necessaries for himself, which were for the use of the troops under his command.

Perceval was to have shewn cause against the rule.

LORD KENYON Ch. J. The cockades cannot be considered as necessaries for the defendant, and ought not to have been included in the damages; though it cannot be worth the defendant's while

(a) Vid. *Turner v. Trisby*, 1 *Stra.* 168.

to be at the expence of another trial to apportion the damages. But as to the other article furnished, namely, the livery, I cannot say that it was not necessary for a gentleman in the defendant's situation to have a servant; and if it were proper for him to have one, it was equally necessary that the servant should have a livery. The general rule is clear, that infants are liable for necessaries according to their degree and station in life. This defendant was placed in a situation which required such an attendant. Therefore however inclined I am in general to protect infants against improvident contracts, I think that this case falls within the fair liability which the law imposes on infants of being bound for necessaries, which is a relative term, according to their station in life.

Per curiam,

Rule discharged;

The plaintiff's counsel agreeing to strike out the amount of the cockades.

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DOE on the demise of RYALL *against* BELL and Others.

Tuesday,
May 20th.

ON the trial of this ejectment, which was brought to recover certain copyhold premises called *Reads* and *Greens* in the parish of *Gillingham*, before Mr. J. Lawrence at the last *Dorchester* assizes, a special case was reserved for the opinion of this Court.

E. Read being seised of the two copyholds called *Reads* and *Greens* surrendered the former on the 22d of *April* 1774 and the latter in *June* 1777 to his son *W. Read* in fee, who was accordingly admitted. *W. Read* being seised of these two copyholds, and also of two other copyholds in *Gillingham* called *Maddocks* and *Langham*, which two last were devised to him by his late father *E. Read*, all of which he had previously surrendered to the use of his will, and being also seised of a freehold and possessed of a leasehold estate in *Gillingham*, both of which last were also devised to him by his late father by will dated *March* 9th 1798, devised thus; "As to for and concerning all my freehold copyhold and leasehold estates situate in the parish of *Gillingham* and which I became entitled to on the decease of my father, and also my estate at *Motcombe* which I purchased of *Oliver*, and also my freehold estate in *Buckhouse Weston* which I purchased of Mrs. *Masters*, having pre-

By a devise of "all my "copyhold "estates "situate in "A. and "which I be- "came enti- "tled to on "the decease "of my fa- "ther," co- pyhold estates do not pass, which the deviser's fa- ther had sur- rendered to him in his life time, though the father retain- ed the pos- session of them to the time of his death, which happened prior to the will made by the son; there being other copy- holds of the

son answering the description in the will. viously.

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viously surrendered *all* my said copyhold messuages lands &c. to the use of my will, I give and devise the same to (the defendants) *W. Bell, E. H. and W. W.* their heirs executors &c., to the uses and upon the several trusts therein expressed;” which uses were to secure an annuity of 100*l.* to *W. Ham*, with a power of distress. The will then proceeded thus; “And I do further give and devise to the said *W. Ham* all that my mansion house &c. together with the home field and the field called *Way Ground* at *Langham* for the term of his life; and subject to the payment of the said annuity of 100*l.* to the said *W. Ham*, and also to the life estate of the said *W. Ham* of and in the said mansion house lands and premises before mentioned, to the use of the said *W. Bell, E. H., and W. W.* and to the survivor &c. and the heirs executors &c. of such survivor, in trust for all and every the child and children of the said *W. Bell,*” &c. &c. The mansion-house and the home field and way ground are part of the copyhold called *Reads*. The premises charged by *W. Read*’s will with the annuity to *W. Ham* are of sufficient annual value to pay the said annuity, even if the two copyholds called *Reads* and *Greens* be not comprized in the devise to the defendants. *Edward Read*, who was a farmer, continued to occupy so much of the copyhold premises so by him surrendered to his son *Wm. Read* as were not let off after the said surrenders in the same manner as he had done before until his death which happened in 1799; and his son *W. Read* lived with and assisted him in his business. *Ann Read*, who for some years after the said surrenders rented a house part of *Read*’s copyhold paid rent to *E. Read* the father whilst he and his son so lived together; and in 1778 *E. Read* paid taxes for the said copyhold estates and repaired them. *W. Read* after making his will purchased a freehold estate whereof he died seized; and he also died seized of another copyhold estate in the same manor which he had not surrendered to the use of his will; of both which last estates the lessor of the plaintiff is in possession as heir at law to *W. Read*, who died before the day of the demise in the ejectment. The defendants are in possession of the two copyholds called *Greens* and *Reads*. *W. Ham* in the will named is still living; and *W. Bell* has children now living. The question for the opinion of the Court is, Whether the lessor of the plaintiff be entitled to recover both or either or what part of the copyhold estates called *Reads* and *Greens*.

Burrough, for the lessor of the plaintiff, contended that he was entitled as heir at law to recover the copyholds in question called

Reads

Reads and *Greens*, except such part as was given to *Wm. Ham* for life, the rest being undisposed of by the devisor. The words of the first clause of the will giving the copyholds to the trustees are expressly confined to such copyholds *as the devisor became entitled to on the decease of his father*, which consequently do not include the copyholds in question; for to these he was before entitled in his own right. Even if the words were ambiguous, that would be a ground for deciding in favour of the heir at law, who is never to be disinherited but by plain words or necessary inference: but here the words are plain and clear against the devisees. And in this case the devisor having become entitled to some copyhold as well as freehold at his father's death, there is property enough of every description to satisfy all the words of the will. That the devisor did not intend to include *Reads* in the first devise is also evident from the words in the second devise; for having by the first clause devised certain copyholds to the trustees to secure an annuity to *Wm. Ham*, he then devised the mansion-house, the home-field, and the way ground, (which are part of *Reads*,) to the same *Wm. Ham* for life: and the second is a distinct clause from the first, beginning "And I do *further* give and devise," &c.

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Dampier for the defendants. The words, "*and which I became entitled to on the decease of my father*," were intended to be used in their popular sense, meaning all the property of *which the devisor came into the possession and enjoyment at his father's death*. But if the words must have a strict legal construction, the intention, which is manifest in this case, may still be effectuated by giving signification to the word *and*, not as a further description of the same property before described and meant to pass, but as a distinct description of property in addition to what he had before mentioned of that which was his own before his father's death; viz. *my freehold copyhold &c.*, AND *my freehold copyhold &c.* which I became entitled to on the decease of my father. An inference may also be drawn in favour of the defendants from the wording of the second clause, to shew that the devisor thought he had passed the property in question by the first devise. For by the second clause the mansion-house &c., which is part of *Read's* estate, is thereby given to the trustees subject to *Wm. Ham's* annuity. Now there is no distinct charge of that annuity upon this property unless it were included in the description of the property passed by the

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first clause; and if it were so included, the defendants are entitled to retain the possession.

Lord KENYON Ch. J. With regard to the last observation made by the Defendant's counsel; those words must be construed reddendo singula singulis; "As to the estate first devised, subject to the annuity of *W. Ham*, and as to the mansion-house &c. lastly devised subject to *W. Ham*'s life estate, I devise them respectively to the trustees" &c. What the devisor really meant in this case I do not know with absolute certainty: but certain rules have been for a long time established respecting the construction of wills, which we must not abandon; one is, that the heir at law is not to be disinherited without positive words in the will or a plain intention in the devisor that he shall be so, to be collected from the words of the will; another rule is, that we must, if possible, give effect to all the words of the will. Now these two rules will assist us much in the construction of the will in question. The devisor had several estates of various denominations; some of the copyholds his father had surrendered to him in his life-time, and others his father had devised to him by will; and the devisor in making his will devised thus, "As to for and concerning all my freehold copyhold and leasehold estates situate in *Gillingham*, and which I became entitled to on the decease of my father &c," I devise to the defendants &c. Now he had estates of all the enumerated descriptions, freehold copyhold and leasehold, to which he became entitled on the death of his father, without including the estates in question; those are therefore sufficient to satisfy the whole of this will. But it is argued that as he died seised of the estates in question which are copyhold and situate in *Gillingham*, and which he had surrendered to the use of his will, those estates also passed by this clause to the defendants: but I am of opinion that they did not; for he did not become entitled to them on his father's death. If we were to determine that they passed by this devise, we should disinherit the heir at law not by positive words or the plain intention of the devisor, but by conjecture merely and by rejecting some important words in the will; which would be contrary to both the rules I mentioned at first. Besides which, according to the defendants' construction, he devised both the estates in question by the first clause for the purpose of securing an annuity to *W. Ham*, and yet in the subsequent clause he again took up the consideration of part of the same premises and devised that part to the very person who

before

before was entitled to an annuity out of it. So that this mode of construing the will would render the different parts of it contradictory to each other: whereas, according to the plaintiff's construction, there is no contradiction in the will, and every word in the will will have effect.

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GROSE J. The devisor died seised of the copyhold estates which had been surrendered to him in his father's life-time and of other copyholds to which he became entitled on his father's death; and, in devising the estates which he meant to give to the defendants, he described them as the estates "to which he became entitled on the death of his father:" but that devise cannot include the other estates which he had in his own right in his father's life-time. And these words are the more important, because the devisor in every part of the will described the manner in which he became entitled to the different estates that he intended to devise.

Per curiam,

Postea to the plaintiff.

The KING *against* The Justices of the County of
ESSEX.

Friday,
May 23d.

THE Reverend J. R. Holder, having given notice of his intention to appeal to the Quarter-Sessions in *Essex* against a rate made for the relief of the poor of the parish of *Upminster*, on the day before the Sessions countermanded his notice; whereupon the parish-officers of *Upminster* applied to the Sessions for the costs to which they had been put in preparing to resist the appeal, under the Stat. 17 Geo. 2. c. 38. §. 4. But the Court of Quarter Sessions, thinking they had no authority under the statute to give costs as no appeal was entered, refused to hear the evidence which the parish officers were prepared to offer, in order to shew that they had been unnecessarily put to great expence.

If a person give notice of his intention to appeal to the Quarter Sessions against a poor-rate but do not enter his appeal, the Sessions cannot award costs to the other party under the Stat. 17 G. 2. c. 38.

Pooley now moved for a mandamus to be directed to the justices of the county commanding them to hear evidence on the subject, as (he said) that the magistrates had refused to hear the evidence not because they would not in their discretion have awarded costs to the parish officers but because they thought they had no jurisdiction. And he contended that the Court of Quarter Sessions have the same authority to award costs in cases where notice of appeal

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appeal against a poor-rate has been given, though no appeal be entered, as they have in the instance of a notice of appeal against an order of removal. The Stat. 8 & 9 W. 3. c. 30. s. 3., to prevent vexatious appeals against orders of removal, authorizes the Court of Quarter Sessions to give costs upon appeals "or upon any proof before them of notice of any such appeal to have been given &c., though they do not afterwards prosecute such appeal &c. (a)" And the Stat. 17 Geo. 2. c. 38., speaking of appeals against poor-rates, enables the justices at the sessions "to award to the party for whom such appeal shall be determined reasonable costs *in the same manner that they are empowered to do in case of appeals concerning the settlement of poor persons*, by Stat. 8 & 9 W. 3. c. 30. This statute therefore referring to the former one 8 & 9 W. 3. meant to extend to both the cases there mentioned, to cases where notice of an intended appeal has been given though afterwards abandoned as well as to cases where the appeal has been heard. By the former statute they are both put upon the same footing; and the latter statute intended to give power to the Sessions to award costs in the instance of a poor-rate in all cases where before they could give costs in the instance of an order of removal. But

The Court thought that the Quarter Sessions have no authority to award costs under the Stat. 17 Geo. 2. c. 38., unless an appeal has been entered and determined; that the determination of the appeal was a condition precedent to their power to give costs, the words of the act being "may award to the party for whom such appeal shall be determined reasonable costs &c.;" and that the subsequent words "in the same manner that they are empowered to do in case of appeals concerning the settlement of poor persons" &c. only related to the mode in which those costs are to be recovered. That by referring to the former statute under which costs may be given in two instances, and by mentioning only one

(a) By that section "for the more effectual preventing of vexatious removals and frivolous appeals," it is enacted "that the justices of the peace of any county or riding in their General or Quarter Sessions of the peace upon an appeal before them there to be had for and concerning the settlement of any poor person, or upon any proof before them there to be made of notice of any such appeal to have been given by the proper officer to the churchwardens or overseers of the poor of any parish or place (though they did not after-

wards prosecute such appeal) shall at the same Quarter Sessions award and order to the party for whom and in whose behalf such appeal shall be determined, or to whom such notice did appear to have been given as aforesaid, such costs and charges in the law as by the said justices in their discretion shall be thought most reasonable and just, to be paid by the churchwardens, overseers of the poor, or any other person, against whom such appeal shall be determined or by the person that did give such notice as aforesaid &c.

of those instances in the latter statute, it was evident that the Legislature did not intend by the latter to authorize the Sessions to give costs in both cases.

Rule refused.

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The KING
against
The Justices
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The KING *against* G. RING.

Monday,
May 26th.

TWO persons of the names of *Everland* and *Davis* having been committed to *Salisbury* gaol in *February* last on a charge of felony, the prosecutor on the 5th of *March* last procured a subpoena on the part of the Crown from the Crown-Office, requiring *Ring* a material witness to appear at the then next assizes at *Salisbury* to give evidence. *Ring* not appearing according to the subpoena, the grand jury for the county of *Wilts* threw out the bill against *Everland* and *Davis*, who were thereupon discharged out of custody. At the beginning of this term

Jekyll moved, on the part of the prosecutor, that an attachment might issue against *Ring* for not obeying the writ of subpoena; on an affidavit stating the above facts, and also stating that *Ring* had been personally served with the subpoena, and that he was a material witness in support of the prosecution.

The Court then doubted whether, as there was no proceeding in this court, the subpoena were properly issued from the Crown-Office, but granted a rule to shew cause, desiring that the rule might not afterwards be made absolute without their being apprized of it, and recommending an inquiry to be made into the practice on this point.

Jekyll now moved to make his rule absolute; saying that there was no opposition to it, and that on inquiry at the Crown-Office he had found that a similar attachment had been granted against one *Shilcox* in 1793 (a).

(a) In *Trinity* Vacation 1793 A writ of subpoena issued out of this court directed to *T. Shilcox* and others, requiring them to appear at the *Old Bailey* Sessions in *October*, and give evidence against *John Swindon* for felony. In *Michaelmas* Term 1793 *Shilcox* not having appeared to give evidence in obedience to the subpoena, this Court, on the motion of *Garrovo*, granted an attachment against him for a contempt in not pay-

ing obedience to the subpoena. On the 17th of *February* 1794 *Shilcox* was taken into custody upon this attachment in *Warwickshire*, and removed from thence to *London*; and having in the *April* Sessions 1794 given evidence against *Swindon* at the *Old Bailey*, who was convicted and executed, this Court in *Hilary* Term 1795 ordered *Shilcox* to be discharged out of custody from the attachment.

A subpoena may be issued from the Crown-Office, requiring a witness to attend at the assizes in the country to give evidence in support of an intended prosecution for a felony; and this Court will grant an attachment against him for not attending in obedience to the subpoena.

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Lord KENYON Ch. J. We also have directed inquiries to be made on this subject, and we find that this application is warranted by precedents.

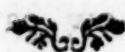
Per curiam,

Rule absolute.

THE END OF EASTER TERM.

ERRATA:

- Page 435. line 5 from the bottom, for "bail" read "bale"
 437. — 7. for "was Danish" read "was not Danish"
 440. — 4. for "maritme" read "maritime"
 464. — 21. for "expired" read "was served"
 Ib. marg. S. P.



C A S E S

1800.

ARGUED and DETERMINED
IN THE
Court of KING'S BENCH,
IN
Trinity Term,

In the Fortieth Year of the Reign of GEORGE III.

In the last vacation and in this Term the following promotions took place.

Mr. Baron *Chambre* was appointed one of the Judges in the Court of *Common Pleas* on the death of the late Mr. Justice BULLER.

Robert Graham Esq. of the *Inner Temple*, Attorney General to his Royal Highness the Prince of Wales, was appointed a Baron of the Court of *Exchequer* in the room of Mr. Baron *Chambre*, and received the honour of knighthood.

Vicary Gibbs Esq., one of his Majesty's Counsel and the Solicitor General to his Royal Highness the Prince of Wales, was appointed Attorney General to the Prince of Wales.

T. Manners Sutton Esq. of *Lincoln's Inn*, Barrister at Law, was appointed Solicitor General to his Royal Highness the Prince of Wales.

T. Manners Sutton Esq. of *Lincoln's Inn*, *Wm. Alexander* Esq. of the *Middle Temple*, and *Samuel Romilly* Esq. of *Gray's Inn*, were appointed to be his Majesty's Counsel learned in the law.

Arthur Onslow Esq. of the *Middle Temple* was called to the honourable degree of Serjeant at Law. The motto on his rings, and on those of Mr. Baron *Graham* who was called to this degree at the same time, was "*Et placitum læti componite Fœdus.*"

1800.

Wednesday,
June 18th.The KING *against* JOHN SMITH.

It is an offence within the statute 40 Geo. 3. to sell by wholesale bread before it has been baked twenty-four hours even though the seller give directions to the person to whom he sells not to sell it by retail until the expiration of the twenty-four hours. Where power of conviction is by statute given to a magistrate, he is the sole judge of the weight of the evidence given before him, and this Court will not examine whether or not he has drawn a right conclusion from the evidence: but if no evidence appear on the conviction to support a material part of the information, this Court will quash the conviction.

THIS was a conviction on a late act of parliament 40 Geo. 3. c. for selling to one *Robert Chappell* thirty loaves of bread, which had not been baked twenty-four hours before the time of selling the same. The evidence given in support of the conviction was as follows; "*Mary Chappell* upon her oath deposeseth &c. that *she* keeps a shop in *Drury Lane* and sells bread; that she buys it of *J. Smith*, of *St. Martin's Lane*, the corner of *Hemmings Row*, baker; that this day (1st March 1800) she was at home and received thirty loaves of bread; that they were brought to her by the said *J. Smith's* cart, and that the said *John Smith's* servant delivered them into her shop; that the man put them in himself; that the bread was felt by her about twelve o'clock, that it was new; that *she* has the shop and parlour which go in the name of *Robert Chappell*, and he has no partner; that the said bread could not have been baked twenty-four hours; And the said *John Dunn* upon his oath deposeseth and saith, that he knows a shop in *Drury Lane* kept by *Robert Chappell*, which is near *Wyck Street*; that he passed the shop this morning and saw a cart standing there with a great number of loaves; that he is sure that they were thirty which he saw carried from the cart into the shop; that it is a chandler's shop; that the loaves smoked and were hot; that he is sure they were new loaves; that the baker lives in *Saint Martin's Lane* &c.; And the said *Thomas Moore* upon his oath deposeseth and saith that he knows a baker at the corner of some street in *Saint Martin's Lane*; that this morning at his shop the corner of *Craven Buildings* he saw some bread delivered at *Chappell's*, which he saw reeking and smoking, and that it was apparently hot; that he cannot tell whose cart it was; that a hand-bill was left at his shop some time before; that a *Mr. Smith* had opened a shop at *Mr. Chappell's* to sell cheap bread; that he thinks there were twenty-five or thirty loaves of bread; And the said *John Langland* upon his oath deposeseth and saith that he sees a cart every day with the name of *Smith* on it; that this day he was told that that cart was there at eight o'clock; that he usually sees it at eleven o'clock." It appeared on the conviction that the defendant being called upon for his defence before the magistrate said "That he had never seen the act; that he had heard people who came into his shop say that bread must not be sold till twenty-four hours after baking; that

that this morning he sent the thirty new loaves to Mr. *Chappell's* house, and he told the boy to tell Mr. *Chappell* not to sell them until *Monday*, but did not produce any evidence to prove the same, nor did he require any further time for that purpose," &c; Whereupon he was convicted &c. By the statute, on which the conviction was founded, it is enacted that "it shall not be lawful for any baker or other person or persons residing within the cities of *London* and *Westminster* &c. to sell or offer or expose to sale any bread until the same shall have been baked 24 hours at the least; and every baker or other person or persons who shall offend therein shall for every offence forfeit and pay the sum of 5*l.* for every loaf of bread so sold offered or exposed to sale &c."

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The KING
against
J. SMITH.

Wetherell took two objections to the conviction; 1st, That there was no evidence of any sale at all by the defendant, it being merely proved that the bread in question was brought to *Mary Chappell* in the defendant's cart, and received by her: but even if it be considered that the bread was sold by the defendant, 2dly, That this was not a sale within the meaning of the act of parliament on which the conviction was founded, because it appeared that the defendant did not sell the bread by retail, but on commission only, giving directions to the person to whom he sent it not to sell the bread until a subsequent day.

Lord KENYON, addressing himself to the counsel for the prosecution, asked if he could point out any evidence to support that part of the information which charged the defendant with having sold the bread to *Robert Chappell*.

Lawes, for the prosecutor, answered that the evidence of the two first witnesses was sufficient to support that part of the information; for that the first of them swore "that the shop and parlour (to which the bread was sent by the defendant) went in the name of *Robert Chappell*," and that the other proved "that the shop was kept by one *Robert Chappell*."

Lord KENYON Ch. J. I fear that this objection cannot be got over. There is no evidence whatever to shew that the bread was sold, as the information charges, to *Robert Chappell*. The evidence of the first witness rather negatives it; for, according to her account, the bread was sold to *Mary Chappell*, as she swore that "*she* kept the shop;" and it does not appear that she was the wife of *Robert Chappell*, or employed by him. And the testimony of the next witness only shews that *Robert Chappell* kept a shop in *Drury Lane*,

(a) Vide *R. v. J. Reason*, ante, 6 vol. 376.

but

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but not that he kept the shop in question. If indeed there had been *any evidence* whatever (however slight) to establish this point, and the magistrate who convicted the defendant had drawn his conclusion from that evidence, we would not have examined the propriety of his conclusion; for the magistrate is the sole judge of the weight of the evidence (*a*). And for this reason I think there is no foundation for the first objection taken by the defendant's counsel. There was *some evidence* from which he might draw the conclusion that the defendant had sold the bread, which was the subject of the information. With regard to the second objection taken that this was not an offence within the act of parliament; I should be sorry to have it understood that the construction which the defendant wishes to put upon the act is the true one. The words of the statute are positive that no person shall sell. No distinction is made in the act between the different kinds of sale; and whether it be a sale on commission or a sale by retail, it is equally a sale within the act. And in this case it is to be observed that no evidence was given to shew that this was not a sale by retail; the defence before the magistrate rested altogether on the defendant's own statement. But the objection, that it does not appear that the bread was sold to *Robert Chappell*, seems decisive; on that ground I think that the conviction must be quashed.

Per curiam,

Conviction quashed.

(*a*) Vide *R. v. J. Reason*, ante, 6 vol. 376.

Thursday,
 June 19th.

The Mayor &c of SOUTHAMPTON *against* GRAVES.

Pending an action by a corporation for tolls, the Court will not grant leave to inspect the corporation muniments on the application of the defendant, a stranger to the corporation.

THE corporation of *Southampton* brought an action against the defendant for certain tolls for wharfage on landing goods; pending which the defendant, who was not a corporator, obtained a rule in the last term calling on the plaintiffs to shew cause why he should not be at liberty to inspect all the corporation books papers writings and orders of council touching the matter in question, and take copies thereof, paying a reasonable sum for the same.

Erskine now shewed cause against the rule, and admitted that in very modern times a practice had obtained for the Court to grant rules of this sort (*a*), but contended that the practice had crept in

(*a*) *Mayor of Lynn v. Denton*, ante, 1 vol. 689; *The Corporation of Barnstable v. Lathey*, ante, 3 vol. 303; *The Mayor &c of London* v. *The Mayor &c of Lynn*, 1 *H. Blac.* 211; Vide *Rex v. Babb*, ante, 3 vol. 579.

without sufficient consideration, and was not founded in principle or supported by former precedents. The reason assigned for granting such an inspection, namely, that it would be obtained of course by filing a bill in Chancery for a disclosure is not founded in fact; for that Court will exercise its discretion upon every such application, and grant or refuse the inspection according to the circumstances of the particular case. But even if it were true, it would not follow that a Court of Law would grant the same disclosure upon a summary application, because it might be obtained from the Court of *Chancery* upon a bill filed; for that would be to confound the jurisdiction of the Courts of Law and Equity. In *2 Vez.* 620. upon an application for an inspection of corporation books and papers of the city of *Exeter*, pending an action brought by the corporation against certain traders for petty customs, Lord *Hardwicke* said, "It has been refused to inspect at law into corporation books, and rightly; because Courts of Law will not give that liberty to any one who has not some right or claim to it, being a member of the corporation. So as to a manor; in the question between lord and tenant a Court of Law will give liberty to inspect books of the Court Rolls, but not in a question between lords of different manors; yet on a bill in this Court for a discovery, this Court will grant it." A corporation having the same rights of property as an individual, there seems no ground for making a distinction between them in this respect; and as no such rule would be granted to inspect the muniments of a private person claiming tolls, neither ought it to be granted against a corporation upon a similar claim.

Gibbs and *Burrough*, in support of the rule, relied upon the modern practice established in the cases alluded to, which could not be distinguished from the present. They said that the practice was established to save the expence of applying to the Court of *Chancery* where such inspection would certainly be granted. That this appeared even from the case in *Vezey*, although it was there stated that the practice of the Courts of Law was then different. That if it were reasonable for the Court of *Chancery* to make a distinction between the case of a public body, such as a corporation, and that of a private person, the same reason would warrant the practice which has of late years been adopted by the Courts of Law.

Lord KENYON Ch. J. As all the determinations on this subject prior to the late decisions that have been relied on by the defendant are against this application, I do not think it is too late even

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&c. of
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TON
against
GRAVES.

1800.
 The MAYOR
 &c. of
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 GRAVES.

now to review those late decisions and see whether or not they are supported by principle. It has been contended on behalf of the defendant that an inspection of books papers and writings is to be granted in cases where a corporation is a party to an action : but is the rule to extend to cases where a sole corporation, a bishop for instance, sues ; or is it to be confined to cases where an aggregate corporation is a party ? Corporations like individuals have their rights and estates ; they may (except where they are restrained by the statutes of mortmain) acquire landed property : but according to the doctrine now relied upon by the defendant in every case where a corporation are parties to a suit an inspection of their writings is to be granted of course. Where indeed the dispute is between different corporators, there an inspection of the writings belonging to the corporation may be granted, because each party has a right to see them : but I cannot conceive why an inspection of the muniments of a corporation should be granted when a similar inspection would be denied if the suit were between private persons only. Great inconvenience and injustice would ensue from establishing the rule insisted upon by the defendant. A Court of Equity knows it's own province ; it will examine into cases of this kind when the application is made, and adapt it's rules to the individual case in the manner best calculated to attain the ends of justice. But if this Court is to grant an inspection of title deeds, it must be a general rule framed to embrace all cases. Now the inconvenience of this may be illustrated by this example ; suppose an application of this kind were granted against a purchaser of an estate for a valuable consideration without notice of some prior estate, the defect is disclosed to the adverse party, who gets possession of the prior deeds and then defeats such purchaser at law. If an application be made to a Court of Equity to compel a party to produce his muniments, he may answer that he is not bound to produce them because he is a purchaser for a valuable consideration without notice ; that is a good plea to a bill for a discovery. Then suppose that a corporation, instead of an individual, purchase an estate for a valuable consideration not knowing that there is an outstanding legal estate ; they would be protected in equity, but according to the defendant's rule the adverse party would have a right as a matter of course to pry into and examine the defect of the title of the corporation. I have no doubt but that the late cases, on which the defendant has relied, were decided with the most honourable intention, but I think that when they were decided the

whole merits of the question were not embraced. A similar mistake was (I think) made in this Court some few years before I sat here, on another question, where it was decided that an action at law might be maintained for a legacy (a) partly on the ground that the plaintiff would have recovered it as of course in a Court of Equity; on it's being mentioned to me by the late Mr. Justice *Buller*, I took the liberty of asking him whether or not he was sure that the Court had taken a view of the whole question before they decided it, reminding him that it is a constant rule in Courts of Equity, when a husband files a bill for a legacy given to the wife, that (if I may use the expression) they stop it in transitu if there be no provision for the wife, whereas if a legacy could be recovered in an action at law there would be no provision made for the wife and family, as the husband would at once take the legacy; that learned judge, whose legal knowledge was universally allowed, immediately admitted the force of the observation. There was indeed a case in *Cromwell's* time in which an action at law for a legacy was maintained (b); but the reason given for that decision was that there would be a failure of justice (c) if Courts of Law did not take cognizance of the question, the Spiritual Courts not being then open: but as soon as those Courts resumed their functions, suits of this kind returned into their proper channel. And since I have set in this place, it has been determined that a legacy cannot be recovered in a Court of Law (d).

With regard to this particular question, Lord *Hardwicke*, who perfectly well understood the boundaries between the Courts of Law and Equity, expressly said that courts of law cannot grant such an inspection as is prayed for in this case, though a Court of Equity can: but then a Court of Equity will only do it in certain cases after examining into the circumstances of the case. I cannot therefore acquiesce in the late decisions alluded to. I cannot make a distinction in this respect between a corporation aggregate and a corporation sole, or between a corporation sole and a private per-

(a) *Hawkes v. Saunders*, Cowp. 289.

(b) *Vid. Sty.* 55.

(c) In *Nicholson v. Shirman*, 1 Sid. 46.

“Fuit resolve per totam curiam que action sur le case ne gist pur un legacy, mes les parties doivent suer pur ceo in le spiritual Court, a quel le jurisdiction de tous testamentary causes properment appent. Et coment tiel actions ont estre allow de tardif temps, encore ceo ne fuit forsque propter necessitatem a prevenir un fayler de justice

quant la ne fueront spiritual Courts; mes ore come L'Evesques sont restore a leur terre issint doivent ils estre restore a leur proper jurisdiction; car cest court, que est le governor et director de tous inferior courts, et que ad use pur correct eux quant ils intromit ove causes hors de leur jurisdiction, ne voet pas robb eux pur increaser les causes.”

(d) *Deeks & Ux. v. Strutt*, ante, 5 vol. 690.

1800.

The Mayor
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against
GRAVES.

son

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son suing in his individual capacity. I think that we should establish an inconvenient and an unjust rule, and should act against principle, and against all the authorities, (except the late decisions which proceeded on a mistake) if we were to grant the present application; and therefore this rule must be discharged.

GROSE J. When I first came into this Court it was understood to be the constant practice to grant rules of this kind as matters of course: but my Lord Chief Justice has clearly shewn that the reason given for it is not true; the party applying to a court of equity has not the benefit of his application as a matter of course; that court will examine all the circumstances of the case and exercise its discretion accordingly. Such an application as this was made to the Court of Common Pleas in a case reported in *Wilson* (a) where Lord Ch. J. DE GREY seemed to be of opinion that the party applying had no right to inspect the corporation books. And considering the case on principle, I do not see any reason why such an indulgence should be allowed in the case of a corporation when it would be refused if the action were brought by an individual.

LAWRENCE J. In the case of the corporation of *Barnstable v. Lathey* I made the application to inspect the corporation books, on the authority of the Mayor of *Lynn v. Denton*, and at that time Lord *Kenyon* intimated a doubt upon the question; and though the rule was at first granted, I believe that ultimately the party had not the benefit of it (b). The foundation of the decision in the case of the mayor of *Lynn v. Denton* was that liberty to inspect the corporation books and papers would be granted in equity as a matter of course, and that it would only create expence to the parties to send them into that court. But on looking into the authorities it does not appear that a court of equity will grant an inspection as a matter of course. In the case cited from *Vezey* Lord *Hardwicke* thought that courts of law ought not to grant an inspection of the corporation books in such a case as this; and though he said that in a court of equity such an inspection would be granted, I do not understand that it would be granted in all cases as of course, but only under certain circumstances. In the case in 3 *Wilson* Lord Ch. J. *De Grey* thought such an application as the present an extraordinary one. He said "Do you lay it down in general that a stranger has a right to inspect the books of a corporation? How has a stranger

(a) *Hodges v. Atkis*, 3 Will. 398.

(b) *Vid. ante*, 3 vol. 305. n. a.

to a corporation more right to inspect their books than the books of a private person? While Lord *Camden* sat here, there was the like motion, in the like action of trespass where the defendant justified under the corporation of *Ipswich* for distraining for a toll for repairing a quay there, and the motion was refused, the plaintiff there being a stranger to the corporation. And I am sure in many cases like the present the motion has been refused." He however declined giving a positive opinion on the point, because the cause was not at issue. Considering therefore the weight that is due to the opinions of Lord *Hardwicke* and Lord Ch. J. *De Grey*, notwithstanding the practice that has obtained since, I think it is better to recur back to the ancient practice, particularly as the reason given for the late decisions is not a satisfactory one.

LE BLANC J. I do not see any distinction in this respect between the case of a corporation and that of an individual suing, nor how after this application should be granted we could refuse a similar application in an action brought by an individual.

Per Curiam,

Rule discharged.

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The MAYOR
&c. of
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TON
against
GRAVES.

INNES *against* Sir T. WALLACE DUNLOP, Bart.

Friday,
June 20th.

THIS was an action upon promises. The first count in the declaration stated that on the 24th of *September* 1776 the defendant together with *T. Wallace* and *J. Boswell* made their joint and several bond in *Scotland* for 500 *l.* and lawful interest to *Hunter* and Co. payable at *Whitsunday* then next, together with 100 *l.* as a liquidated penalty in default of payment on that day; that default was made in payment on that day; that on the 22d of *May* 1779 *Hunter* and Co. according to the laws of *Scotland* assigned the said instrument to *John Hunter*, who in *May* 1787 assigned it to *J. Robertson*, who in *November* 1793 assigned to the plaintiff, of which the defendant had notice; that by reason of the premises and according to the law of *Scotland* the defendant became and was indebted to the plaintiff in the said sum of 500 *l.* and also in 100 *l.* for the liquidated penalty; and being so indebted he in consideration thereof promised to pay &c. In the second count it was stated that on the 1st of *May* 1779 the defendant was indebted to *Hunter* and Co. in 1400 *l.* for money lent and advanced by them to the defendant in *Scot-*

The assignee of a Scotch bond may maintain an action of assumpsit here against the obligor in his own name.

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son suing in his individual capacity. I think that we should establish an inconvenient and an unjust rule, and should act against principle, and against all the authorities, (except the late decisions which proceeded on a mistake) if we were to grant the present application; and therefore this rule must be discharged.

GROSE J. When I first came into this Court it was understood to be the constant practice to grant rules of this kind as matters of course: but my Lord Chief Justice has clearly shewn that the reason given for it is not true; the party applying to a court of equity has not the benefit of his application as a matter of course; that court will examine all the circumstances of the case and exercise its discretion accordingly. Such an application as this was made to the Court of Common Pleas in a case reported in *Wilson* (a) where Lord Ch. J. DE GREY seemed to be of opinion that the party applying had no right to inspect the corporation books. And considering the case on principle, I do not see any reason why such an indulgence should be allowed in the case of a corporation when it would be refused if the action were brought by an individual.

LAWRENCE J. In the case of the corporation of *Barnstable v. Lathey* I made the application to inspect the corporation books, on the authority of the Mayor of *Lynn v. Denton*, and at that time Lord Kenyon intimated a doubt upon the question; and though the rule was at first granted, I believe that ultimately the party had not the benefit of it (b). The foundation of the decision in the case of the mayor of *Lynn v. Denton* was that liberty to inspect the corporation books and papers would be granted in equity as a matter of course, and that it would only create expence to the parties to send them into that court. But on looking into the authorities it does not appear that a court of equity will grant an inspection as a matter of course. In the case cited from *Vezey* Lord Hardwicke thought that courts of law ought not to grant an inspection of the corporation books in such a case as this; and though he said that in a court of equity such an inspection would be granted, I do not understand that it would be granted in all cases as of course, but only under certain circumstances. In the case in 3 *Wilson* Lord Ch. J. De Grey thought such an application as the present an extraordinary one. He said "Do you lay it down in general that a stranger has a right to inspect the books of a corporation? How has a stranger

(a) *Hodges v. Atkis*, 3 Will. 398. (b) *Vid. ante*, 3 vol. 305. n. a.

to a corporation more right to inspect their books than the books of a private person? While Lord *Camden* sat here, there was the like motion, in the like action of trespass where the defendant justified under the corporation of *Ipswich* for distraining for a toll for repairing a quay there, and the motion was refused, the plaintiff there being a stranger to the corporation. And I am sure in many cases like the present the motion has been refused." He however declined giving a positive opinion on the point, because the cause was not at issue. Considering therefore the weight that is due to the opinions of Lord *Hardwicke* and Lord Ch. J. *De Grey*, notwithstanding the practice that has obtained since, I think it is better to recur back to the ancient practice, particularly as the reason given for the late decisions is not a satisfactory one.

LE BLANC J. I do not see any distinction in this respect between the case of a corporation and that of an individual suing, nor how after this application should be granted we could refuse a similar application in an action brought by an individual.

Per Curiam,

Rule discharged.

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INNES *against* Sir T. WALLACE DUNLOP, Bart.

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THIS was an action upon promises. The first count in the declaration stated that on the 24th of *September* 1776 the defendant together with *T. Wallace* and *J. Boswell* made their joint and several bond in *Scotland* for 500 *l.* and lawful interest to *Hunter* and Co. payable at *Whitsunday* then next, together with 100 *l.* as a liquidated penalty in default of payment on that day; that default was made in payment on that day; that on the 22d of *May* 1779 *Hunter* and Co. according to the laws of *Scotland* assigned the said instrument to *John Hunter*, who in *May* 1787 assigned it to *J. Robertson*, who in *November* 1793 assigned to the plaintiff, of which the defendant had notice; that by reason of the premises and according to the law of *Scotland* the defendant became and was indebted to the plaintiff in the said sum of 500 *l.* and also in 100 *l.* for the liquidated penalty; and being so indebted he in consideration thereof promised to pay &c. In the second count it was stated that on the 1st of *May* 1779 the defendant was indebted to *Hunter* and Co. in 1400 *l.* for money lent and advanced by them to the defendant in *Scot-*

The assignee of a Scotch bond may maintain an action of assumpsit here against the obligor in his own name.

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land, and that afterwards *Hunter and Co.* in due manner according to the laws of *Scotland* assigned over the said debt to the plaintiff; that by reason of the premises and according to the laws of *Scotland* the defendant became liable to pay the said sum to the plaintiff, and being so liable he in consideration thereof promised to pay &c. There were four other counts, for money paid by the plaintiff to the use of the defendant, for money had and received by the defendant to the plaintiff's use, for money lent and advanced by the plaintiff to the defendant, and on an account stated. The defendant pleaded the general issue to the four last counts, and demurred to the two first.

Onslow, Serjeant, in support of the demurrer, objected that the plaintiff, who was merely the assignee of a chose in action, could not sue in his own name, but should have brought the action in the name of *Hunter and Co.* the obligees in the bond. But

The Court, after observing that this was not an action on the bond, said that they were clearly of opinion that the assignment of the bond to the plaintiff was a consideration for the assumpsit by the defendant, in the same manner as actions of assumpsit are maintained in every day's practice upon foreign judgments; and that the defendant by demurring had confessed both the consideration and the assumpsit. And therefore they gave

Judgment for the plaintiff (a).

Giles was to have argued for the plaintiff.

(a) Vid. *Fenner v. Meares*, 2 Bl. Rep. 1269.

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PARKINSON against THOMPSON.

Where a prisoner files a plea as of a term prior to that wherein regularly he is called upon to plead, he must give notice to the plaintiff of such plea pleaded, otherwise the plaintiff may sign judgment as for want of a plea.

THE declaration was delivered the last day but one of *Hilary* Term last against the defendant, then a prisoner in the custody of the marshal; and an affidavit of the delivery was made and filed. On the 28th of *February* the defendant was ruled to appear and plead on the 2d of *May* in *Easter* Term (b), which rule expired on *Thursday* after three weeks of *Easter*. On searching the office, and no plea appearing to have been filed in *Easter* Term or in *Easter* vacation as of that term down to the 11th of *June* (two days before *Trinity* Term,) the plaintiff on that day signed judgment

(b) *Easter* Term in this year began on the 30th of *April*, and *Trinity* Term on the 13th of *June*.

ment as for want of a plea, and gave notice of executing the writ of enquiry.

On a former day a rule nisi was obtained for setting aside the interlocutory judgment, and staying the proceedings on an affidavit stating that three days after the delivery of the declaration a plea had been filed in the vacation as of *Hilary* Term preceding.

Espinasse now shewed cause against the rule; contending that the plea so filed before the proper time for pleading, without notice to the plaintiff, was a nullity, and did not prevent the plaintiff signing judgment as for want of a plea of *Easter* Term. That for want of such notice the plaintiff was surprized and misled in his search in the office for a plea. In *Thomas v. Pritchard* ante 4 vol. 664. and *Rusholm v. Chapman* ante 5 vol. 473. it was settled that, where a prisoner pleads earlier than by the rules of the Court he is compellable to plead, he must give notice to the plaintiff of his having so pleaded.

Erskine, in support of the rule, said that though the defendant should not avail himself of a plea pleaded before the proper time in order to obtain his discharge by surprize on the plaintiff, yet on the other hand the plaintiff ought not to be suffered to take advantage of the defendant's promptitude to plead, in order, by treating the plea as a nullity, to exclude him from an opportunity of making his defence.

Per Curiam. Where the defendant pleads before his time without giving notice to the plaintiff, it is a surprize upon the latter, who without such notice is not required by the rules of the Court to search in the office for a plea as of a term prior to that wherein regularly the defendant should have pleaded. What was said in the case of *Rusholm v. Chapman* is in point to this purpose; and the master reports that the practice is as there stated.

Rule discharged (a).

(a) But the Court consented that the defendant should be let in to plead to the action, a proper affidavit of merits being produced.

CHALLENGER against SHEPPARD and Another.

THIS case was sent by the Lord Chancellor for the opinion of this Court. *James Cook*, being seised in fee of the premises in question, by his will duly executed &c. dated July 15th, 1739, devised as follows; "I give and devise to *W. Howe*, *R. Battiscombe*,

estate to the cestui que trust, the latter takes the beneficial interest in fee.

" and

Where an estate in fee is devised to trustees in trust for A. B. without any limitation of the

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and *R. Ames*, and their heirs, all that estate I lately purchased of *Mr. White* called *Larke's Lease*, in the said parish of *Shipton*, in trust for *Joan* the wife of *John Pippet* and *James* her son, one moiety of the profits to be applied by my said trustees to the separate use of the said *Joan Pippet*, and the other moiety to be laid up or otherwise improved till the said *James* shall arrive at his age of twenty-one years; and my will is that if the said *Joan* shall die during the minority of the said *James*, my said trustees shall lay up the increase and profits of the said mother's moiety for the benefit of her said son, and after the decease of the said *Joan* shall permit and suffer the said *James* to enter upon and enjoy *the whole* as soon as he attains his age of twenty-one years. Likewise I give unto my said trustees those two acres lately purchased of *Mrs. Sarah Brown* situate in *Croscombe* aforesaid called *Bullimore* in trust for the said *James Pippet*, to hold to the said *James* and his heirs for ever." In 1749 *James Cook* the testator died seised of *Larke's Lease*, without issue, and without revoking or altering his said will, leaving *Betty Cook*, daughter of his deceased brother *John Cook* his heiress at law, and the said *Joan Pippet* and *James Pippet* the devisees him surviving. The said *Joan Pippet* died in 1754; and the said *James Pippet* survived her, and being then of the age of twenty-one years entered into possession of the estate called *Larke's Lease*, and died so possessed in November 1777. The Court of *Chancery* directed the above case to be made for the opinion of the Judges of this Court on the following question, viz., "What estate *James Pippet* the son of *Joan Pippet* took in the estate called *Larke's Lease* devised to him by the will of the said testator?"

Best Serjt., for the plaintiff, contended (a) that *J. Pippet* the devisee took an estate in fee in the premises called *Larke's Lease* under the will of *J. Cook*. It is a general rule that, where the deviser uses words in his will which shew an intention in him to give the devisee a greater estate than for life, the devisee takes a fee unless there be other words in the will shewing that he intended to restrain the devise to an estate tail. *Com. Dig.* "Devise," N. 4. Now it is apparent that the deviser in this case intended that the devisee should take a greater estate than for life, and there are no words in the will to shew that he did not intend that the devisee should take a fee. The deviser by giving a fee to the trustees shews

(a) This case was argued in the last Term, but the certificate was not sent until this Term.

that he did not intend to die intestate as to any part of his property. An estate in fee is expressly given to the trustees, and it is evident from the whole context of the will that the deviser intended that *James Pippet* the cestui que trust should after his mother's death take a beneficial interest in every thing that was devised to the trustees; for he could not intend that the trustees should take any beneficial interest themselves. In *Newland v. Shepherd* (a), where the deviser devised the residue of his real and personal estate to trustees and their heirs &c. to pay and apply the produce (b) and interest for the maintenance and benefit of his grand-children until they should be of age or marry, without making any further disposition of his estate, it was determined by Lord Chancellor *Macclesfield* that the grand-children should have the surplus both of the real and personal estate after their age of twenty-one. Again in *Peat v. Powell* (c), where the deviser gave the rest residue and remainder of his real and personal estates to trustees, in trust for his younger son *Giles* till he attained twenty-one, and then the trust to cease, Lord Keeper *Henley* after consideration ruled that *Giles* was intended to have the whole beneficial interest in the residue of the real and personal estate, and that the trust was to continue only during his minority; and his Lordship recognized the case of *Newland v. Shepherd*. But there are also words sufficient in this will to pass the fee to the cestui que trust; because, having before devised all *that estate* &c. to the trustees in fee, the testator directed that after the death of *Joan Pippet* if she should die during the minority of her son *James Pippet* was "to enter upon and enjoy *the whole* as soon as he attained his age of twenty-one years." Now that expression "the whole" must relate either to the "estate," or to "the encrease and profits of the mother's moiety;" and whether it relate to the one or the other, the consequence is the same; for by a devise of the rents and profits of an estate, the estate itself will pass, *Salk.* 228.

Gibbs, for the defendant, insisted that *James Pippet*, the devisee, took only an estate for life, because no words of inheritance were added to the devise to him. The argument of the plaintiff, drawn from the two cases in *P. Williams* and *Ambler*, that the beneficial interest that the devisee takes is co-extensive with the legal interest devised to the trustees, is untenable, because it tends to shew that in all cases where an estate is given to trustees and their heirs in

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(a) 2 *P. Williams*, 194.(b) See Mr. Cox's note on this; 2 *P.**Williams*, 194.(c) *Amb.* 387.

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trust, the cestui que trust must take a fee. But the estate of the cestui que trust is not to be measured by the estate devised to the trustees. And a contrary doctrine has at all times prevailed, namely, that the heir at law takes whatever is not expressly devised away from him. The case cited from *2 P. Williams* seems, at least, questionable. But the other case cited from *Ambler* by no means warrants the position for which it was adduced: it was evident in that case that the testator intended that the devisee should take the whole beneficial interest; he interposed the trustees for the purpose of protecting the estate during the minority of the son, and he directed that the trustees should cease to have any control over the estate when the son attained the age of twenty-one. But there is nothing in this will from which it can be collected that the testator intended that *James Pippet* should take the fee. No fair argument in his favour can be derived from the use of the word "estate." It may be admitted that in many cases the word "estate" will pass a fee without words of inheritance. But that word has not that effect where it is used to designate the local situation of the premises; and it is used for that purpose in this will, the devise being of "all that estate I lately purchased of Mr. *White* called *Larke's Lease* in the parish of *Skipton*," which is equivalent to saying all my estate or that my farm called &c. The introduction of the word "estate" here cannot vary the question, because it is only applicable to the devise to the trustees, and the estate was before given to the trustees and their heirs. The utmost effect that the use of that word could have would be to give a fee by implication to the trustees, if it had not been expressly given before; but it does not follow that therefore the cestui que trust shall take a fee. The plaintiff's argument, as founded on the introduction of this word "estate," proceeds on a fallacy, in supposing that the word "estate" is used in the devise to the cestui que trust, whereas it is merely used in the devise to the trustees. Recourse was then had to another expression in the will "to enter upon and enjoy *the whole*," to shew that the testator intended that the devisee *James Pippet* should take the whole interest in the premises after his mother's death: but those words were inserted in the will merely for the purpose of giving both the moieties of the land to the devisee which had before been severed. The deviser, having first directed that the mother should take one moiety and the son the other, then directed that the son after the mother's death should enjoy *the whole*, that is, *both the moieties*: but that does not prove that the son was

to take a fee in the whole. This very case is put in *Com. Dig.* "Devise" N. 14. A devise of "part to *A.* for life, the other part to *B.* and after the death of *A.* the whole to *B.*; he takes only for life;" cit. 1 *Rol. Abr.* 834. pl. 20. "So a devise to two sons and their heirs, and if either die before marriage or within age and without issue, the whole to the survivor, the survivor takes only for life;" cit. 1 *Rol. Abr.* 836. l. 5 (a). And in this case, if the testator had intended to give a fee to *James Pippet*, he would have given such an estate in express terms, since it is clear from the devise to the trustees and from the subsequent devise to *James Pippet* himself that he knew how to frame such a devise.

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Best in reply. It is not necessary to contend that the heir at law will take whatever is not devised away from him, because here the fee is expressly given to the trustees; and by that devise he has manifested his intention that the heir at law should not take. Then if the estate did not descend to the heir at law, the question is to whom it is devised? And the two cases cited from 2 *P. Williams* and *Ambler* shew that the law has already put a construction on a will framed like the present, and has said that the cestui que trust shall take a beneficial interest in the whole that is devised to the trustees.

The Court gave no opinion when this case was argued, but the following certificate has been since sent to the Lord Chancellor. "This case has been argued before us by counsel. We have considered it, and are of opinion that *James Pippet*, the son of *Joan Pippet*, took a beneficial interest in fee in the estate called *Larke's Lease* under the will of the said testator *James Cook*."

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KENYON.
N. GROSE.
S. LAWRENCE.
S. LE BLANC.

(a) The passages referred to in *Roll. Abr.* do not warrant the positions in *Com. Digest*; and according to the account of the last case in *Hard.* 150. this question did not arise.

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The tenant of a house covenanted in his lease to pay a reasonable share and proportion of supporting repairing and amending all party walls &c. and to pay all taxes duties assessments and impositions parliamentary and parochial, "it being the intention of the parties that the landlord should receive the clear yearly rent of 60*l.* in net money without any deduction whatever;" during the lease the proprietor of the adjoining house built a party wall between that house and the house demised, under the stat. 14 *Geo. 3. c. 78.* held that the tenant (not the landlord) was bound to pay the moiety of the expence of the party wall.

ON the trial of this action of assumpsit (which was brought to recover 195*l.* paid by the plaintiff for the proportionate part of the expences of a party wall built by the proprietor of the adjoining house under the stat. 14 *Geo. 3. c. 78. s. 41.*) a verdict was taken for the plaintiff for that sum, subject to the opinion of this Court on the following case.

In the year 1786 the plaintiff by assignment became possessed of a lease granted in the year 1762 by the defendant's grandfather of certain premises on the north-side of the *Great Piazza Covent Garden* for a term of thirty years, of which about six years were then unexpired, under a yearly rent of 60*l.* On the 6th of *October* 1788 a new lease was granted by the defendant to the plaintiff for a term of thirty-one years, to commence at the expiration of the said lease or *Lady Day* 1792, at 60*l. per annum*: The last-mentioned lease is stated to be granted in consideration of the great expence and charges which the plaintiff had been at in repairing the premises and also in consideration of the following, among other, covenants; "And likewise that the said *Michael Barrett* his executors administrators and assigns shall and will from time to time and at all times during the continuance of the said term hereby granted bear pay and discharge all taxes rates *duties assessments* and impositions of what nature or kind soever, and *whether parliamentary or parochial*, imposed or charged or which at any time during the term hereby granted shall be imposed or charged on the hereby demised premises or any part thereof or upon the landlord for the time being in respect thereof or of the said rent reserved for the same; it being the true intent and meaning of these presents and of the parties hereto that the said Duke of *Bedford* his heirs and assigns shall have and receive *the said yearly rent or sum of 60 l.* hereby reserved in *net money, without any deduction defalcation or allowance out of the same on any account whatsoever*; and that he the said *Michael Barrett* his executors administrators and assigns shall and will from time to time and at all times during the said term hereby granted bear pay and discharge all rates and assessments for and towards the maintenance of the rector and his curate or assistant and other church officers of the said parish of *Saint Paul Covent Garden* as shall during the said

said term be assessed by the churchwardens of the said parish for the time being or any two of them on the said hereby devised premises or on the inhabitant or inhabitants thereof for that purpose. And further that he the said *Michael Barrett* his executors administrators and assigns or some or one of them shall and will at all times during the said term of thirty-one years hereby demised at his and their own proper costs and charges when and so often as need shall require well and sufficiently repair uphold support maintain amend pave scour cleanse empty and keep the said demised premises with the appurtenances and all the brick walls and fences of and belonging or hereafter to belong to the same and the pavement in the piazza or portico and the street before all the front of the said premises and all the other pavements and all the walls posts pales iron and other rails privies sinks sewers wydraughts drains houses of office and other appurtenances thereto belonging or which shall hereafter belong to the same with all manner of needful and necessary reparation cleansing scouring and amendments whatsoever; and also that he the said *Michael Barrett* his executors administrators and assigns shall and will during the term hereby granted as often as need shall require bear pay and allow a reasonable share and proportion of or for and towards *supporting repairing amending and cleansing all party walls*, party gutters, common sewers, public sewers, and drains, belonging or which at any time during the said term hereby granted shall belong to the said hereby demised premises or any part thereof." These covenants are verbatim as in the old lease, with the exception of such parts as relate to the payment of the land-tax by the tenant, which by the former lease was paid by the landlord, and the amount of which was 22 *l.* 10 *s.* *per annum*. The demised premises consist of two shops on the ground floor, and a range of apartments above stairs. Before the pulling down and building of the party wall hereinafter-mentioned one of the shops was underlet by the plaintiff by lease for seven, fourteen, or twenty-one years, at the yearly rent of 60 *l.*, the plaintiff covenanting to pay all the taxes and for water. And the other of the shops was underlet by the plaintiff by lease to one *J. Aldritch* for twenty-one years at the yearly rent of 26 *l.* 5 *s.*, the plaintiff covenanting to pay all the taxes. The residue of the demised apartments was kept by the plaintiff for several years in his own hands, but at the time when the party wall was built he had let them furnished to one *Searle* for twenty-one years at the yearly rent of 210 *l.*, the plaintiff covenanting to pay all the taxes. At the time

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the party wall was built the taxes paid by the plaintiff amounted to 72*l.* 3*s.* a year. The question for the opinion of the Court on the above facts is, first, Whether the plaintiff or the defendant be owner of the improved rent under the stat. 14 G. 3. c. 78. *f.* 41. ? Secondly, Whether or not the plaintiff be liable under the covenants of the lease? If the Court are of opinion that the defendant is liable, then the verdict to stand for 195*l.*; If the plaintiff is liable, then a verdict to be entered for the defendant.

E. Morris, for the plaintiff, contended that the defendant must be considered as the owner of the improved rent, and consequently that the expence of the party-wall must be borne by him under the Stat. 14 Geo. 3. c. 78. *f.* 41. It appears that under the former lease the landlord was to pay the land-tax, 22*l.* 10*s.* a-year, which by the new lease is to be paid by the plaintiff; the defendant therefore is the owner of an improved rent to that amount. Or if the defendant be not the owner of an improved rent, then this must be considered as a lease at rack-rent, and there being but one rent the expence of the party-wall must fall on the landlord, according to the cases of *Southall v. Leadbeter* (a), and *Beardmore v. Fox* (b). Thus the case would stand between these parties, if there were no covenants in the lease applicable to this subject. But it will be insisted upon by the defendant that it was the intention of the parties to this lease that the expence in question should be defrayed by the lessee, and that such an intention is to be collected from the covenants to pay taxes and to repair. With regard to the first of those covenants; it is the common covenant to pay taxes; the words "assessments and impositions, whether parliamentary or parochial," mean impositions ejusdem generis, as was said by Lord *Kenyon* in the case of *Southall v. Leadbeter*, where similar words were used. Then if the former part of this covenant to pay the taxes will not throw the expence of the party wall on the plaintiff, neither will the latter part of it, by which it is stipulated that the defendant is to receive the clear rent of 60*l.* without any deduction or abatement, because that must be construed with reference to the preceding part of the covenant; and the meaning of the whole of the covenant is that the plaintiff should pay all taxes, and that no deduction should be made out of the annual rent on account of any taxes. And as to the covenant to repair; it is evident from the words of the covenant that the parties did not intend that they should extend to the expence of building a party-wall. The plaintiff only covenanted to *repair and amend* all party-walls, party-gutters &c, but here a

(a) *Ante*, 3 vol. 458.

(b) *Ante*, 214.

party-wall was *built*, and in such case the act of parliament directs that the expence of it shall fall on the landlord. The parties could not have intended by the introduction of this covenant to make an exception out of the statute in this case, because it appears that the same covenant was inserted in the former lease which was granted before the act of parliament was passed; and the covenant to repair in the new lease ought to receive the same construction as the covenant in the former lease.

Holland, contra, was stopped by the Court.

LORD KENYON Ch. J. If there were no covenants in the lease applicable to this subject, there would be great weight in the plaintiff's argument: but it is not necessary to consider which of these parties would have been liable under the act of parliament; *modus et conventio vincunt legem*. I think it was the intention of the parties to this lease that the expence of the party-wall should be borne by the tenant. Had there been nothing more in the lease than the tenant's covenant to pay "taxes rates duties assessments and impositions whether parliamentary or parochial," I should have entertained the same opinion in this case that I expressed in one of the cases cited, that those words did not extend to building a party-wall: but the latter part of that covenant by which the tenant covenanted that the landlord should receive the "yearly sum of 60*l.* in net money, without any deduction or allowance out of the same," and the covenant respecting the "repairing of all party-walls" &c, satisfy me that the parties intended that this expence should fall on the tenant. These are the covenants of the tenant; and it is a general rule that the words in a deed are to be construed most strongly contra proferentem.

GROSE J. This act of parliament was passed in the year 1774, and the lease was not granted until fourteen years afterwards, when the provisions of the act were universally known. Then these parties having the act before them entered into this lease, in which it was stipulated that the landlord should at all events receive a clear yearly rent of 60*l.*, without any deduction of any kind. The 60*l.* was a kind of ground-rent; and I do not consider the defendant, but the plaintiff, as the owner of the improved rent.

LAWRENCE J. It does not appear to me necessary in this case to determine whether the plaintiff or the defendant be the owner of an improved rent. The short ground of my opinion is, that it was the intention of the parties that the defendant should not be

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put to any expence whatever respecting this house during the continuance of the lease, but that all the expences attending it should be borne by the plaintiff.

LE BLANC J. It seems to me that the covenants to repair are decisive in favour of the defendant. There is first a covenant by the tenant in the usual form to repair; and then follows this covenant by the lessee, "And also shall and will during the term bear pay and allow a reasonable share and proportion of and towards supporting repairing amending and cleansing all party-walls &c." Under this covenant I think that the expence of building the party-wall must be borne by the tenant.

Postea to the defendant.

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June 20th.

BOLT against STENNETT.

The public have a right to use the cranes erected on public quays. — In justifying (in a plea to an action of trespass) the use of a crane in a public wharf, it is sufficient to say that it is "a public open and lawful wharf" without claiming the right by immemorial usage.

THIS was an action of trespass for breaking and entering an erection of the plaintiff's, called *The Crane*, on *Smart's Quay* in the parish of *St. Mary-at-Hill* in the ward of *Billingsgate*, and continuing in the same for the space of twelve hours. The defendant pleaded, besides the general issue, two special pleas of justification. In the first special plea it was stated that *Smart's Quay*, on which the crane was erected, was a *public open and lawful quay* within the port and city of *London* between *London Bridge* and *Blackwall* for the landing thereon of all customable goods of all merchants importing the same for a reasonable compensation to be therefore paid by the merchants to the owner of the quay; that the crane when &c. so erected for the unlading of goods on the quay out of ships lying near the quay for the purpose of being unladen there was necessary for that purpose; that from time immemorial the Mayor and Commonalty and Citizens of *London* have had and still have of right &c the lading and unlading by themselves or their deputy of all goods and merchandizes of all merchants strangers &c. imported into the city of *London* and the liberties thereof, and being so entitled by indenture dated *December 3th 1796* they appointed the defendant their deputy to lade and unlade all such goods for seven years &c, by virtue whereof the defendant before and at the said time when &c became and was entitled as such deputy to have the lading and unlading of such goods; that while the defendant was such deputy to wit, on &c., certain customable goods belonging to merchant strangers were imported from parts beyond the seas into

the port of *London* and within the city of *London* between *Black-wall* and *London Bridge* at *Smart's Quay*, being such public open and lawful quay, for the purpose of being unladen thereon by the direction of the agents of those merchant strangers, whereby it belonged to the defendant to have the unlading of the said goods and to use the said crane, and to enter the same, so then erected and being necessary for the unlading of the goods; whereupon the defendant entered into the said crane and used the same for the unlading of the said goods and landing the same on the said public open and lawful quay, as it was lawful for him to do &c. In the second plea of justification it was alleged that *Smart's Quay*, on which the crane was erected, was an open public and lawful quay within the port and city of *London* &c for the landing thereon of all customable goods of all merchants importing the same into the port of *London* for a reasonable compensation to be therefore paid by the said merchants to the owner of the quay, and that the said crane so erected for the unlading of goods upon the said quay was necessary for that purpose; that on &c certain customable goods belonging to *A. B.* were imported into the port of *London* at *Smart's Quay* for the purpose of being unlading thereon by the direction of the said *A. B.*, whereupon the defendant as the servant of the said *A. B.* and by his command entered into the crane, so being necessary for the unlading of goods upon the said quay, and used the same for the unlading of the said goods &c, as it was lawful for him to do &c.

The plaintiff demurred to the two special pleas; and as to the first assigned for causes of demurrer that it was not alleged in the plea that any compensation was to be paid to the plaintiff for the landing of the said goods on the quay; that it did not appear by that plea that the defendant had any right to land the said goods on the quay, or to enter into or use the crane for the unlading of the said goods, or to continue on the crane or to work it; that it was admitted by the plea that a reasonable compensation was to be paid by the owner of the quay for the landing of the goods, and yet the defendant claimed the landing thereof, which was inconsistent and against law &c. The causes of demurrer assigned to the second special plea were nearly the same as the former. The defendant joined in demurrer.

Wood, in support of the demurrer, took two objections to the pleas. First, that they did not shew any right in the defendant to enter on the crane in question for the purpose mentioned in the pleas; for that the public have no right to enter on all the quays in the

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port of *London* to lade and unlade their goods; and that if they have any such right it could only exist by immemorial usage or custom, which was not stated in either of the pleas. Secondly, that if the public have a right to use the quay in question for the purpose mentioned in the pleas, it did not appear that the defendant had used it in this instance at a reasonable time. But

The Court (stopping *Dampier* who was to have argued for the defendant) overruled both the objections. With regard to the first; they said that it was not necessary to state in terms in a plea of justification under the general right that this was an immemorial quay; that it was sufficient to claim the right under the general words "a public open and lawful quay;" in which respect it was similar to a highway, which may be described "as a public and common king's highway" without alleging it to have been so immemorially. And they referred to what Lord *Hale* said in his treatise *De Portibus maris*, par. sec. cap. 6. (a) "If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the queen according to the stat. 1 *Eliz. c. 11.*, or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, passage, &c. neither can they be enhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the king's license or charter. *For now the wharf and crane are affected with a public interest, and they cease to be juris privati only*; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but it is affected with a public interest." From whence it is obvious that Lord *Hale* considered a public quay to be like a public street, common to all the King's subjects. And, as to the second objection, they said that, if true, it should have been new assigned by the plaintiff, or that, if it were an objection to these pleas, it could only be taken advantage of on a special demurrer assigning this as a cause of demurrer.

Judgment for the Defendant (b).

(a) *Hargr. Tra.* vol. 1. p. 77.

(b) The same question was lately agitated in the Court of Common Pleas, in an action on the case brought by this defendant against the plaintiff for wrongfully and injuriously intruding himself into the defend-

ant's office and employment of Packer's Porter, otherwise Alien Porter, by unlading at this quay certain goods belonging to Aliens, of which the defendant by virtue of his office was entitled to have the unlading and to receive the duties and profits due from

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PEDDER *against* MAC MASTER.Friday,
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RAINE moved for a rule calling on the plaintiff to shew cause why an exoneretur should not be entered upon the bail piece in this cause, and all further proceedings stayed in the mean time, the defendant having become a bankrupt by the laws of *Hamburg* since the debt accrued to the plaintiff, and having duly obtained his discharge by receiving his certificate there; on an affidavit stating these facts: That the debt for which the action is brought was contracted while the defendant was resident at *Hamburg*, and previous to *December* 1796; that on the 9th of *December* 1796 he was declared a bankrupt at *Hamburg* according to the laws of that place, and notice thereof given in the *Hamburg* Gazette which is circulated in this country, and in which notice was given for all the defendant's creditors to come in and prove their debts, otherwise they would be excluded; that the plaintiff might have proved his debt under the defendant's commission, as several of the defendant's creditors did who resided in *London*; that in *October* 1798 he received (what is called in *Hamburg*) his certificate and discharge from his said debts, which according to the laws of *Hamburg* discharges not only the debtor's person but his estate also from all debts due before the bankruptcy; and that the defendant has been since arrested in this action for a debt due before his said bankruptcy. And he cited the case of *Ballantine v. Golding*, M. 24 G. 3. B. R. (a); where on a motion to enter an exoneretur on the bail piece, on the ground that the defendant had become a bankrupt and had obtained his certificate under the great seal of *Ireland*, and that the original demand arose upon a bill of exchange drawn in *Ireland*, payable by the defendant who resided

This Court will not order an exoneretur to be entered on the bail piece, on the ground that the debt was contracted while the defendant was resident in a foreign country, and before he became a bankrupt by the laws of that country, though he may have obtained his certificate there.

(a) *Co. Bank. L.* 515. 4th ed.

from the importers for the unlading thereof. On the trial at *Guildhall* in *May* 1799 this defendant obtained a verdict, the late Lord Ch. J. *Eyre*, who tried the cause, being of opinion that as it was admitted that the merchants had a right to have their goods unladen at the quay in question, as a public quay, they had also by necessary consequence a right to use the cranes

erected there on paying a reasonable satisfaction to the owner; and that the defendant, who by his grant from the city had the privilege of landing the goods, had also, as an incident, a right to use all the accommodations that were provided for the public by the wharfinger for the purpose of landing.

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there, Lord *Mansfield* said, It is a general principle that where there is a discharge by the law of one country it will be a discharge in another. That he remembered a case in chancery of a cessio bonorum in *Holland*, which is held a discharge in that country, and it had the same effect here. And the rule in that case was enlarged and afterwards made absolute by consent, the counsel giving it up upon the authority of *Burrows v. Femimo*, 2 Str. 733.

But the Court said that this was distinguishable from the case cited, for there it did not appear but that both parties resided in *Ireland*, whereas here the plaintiff was resident in this country (a).

Le BLANC J. mentioned a case in the Court of Common Pleas not long ago, in which a similar application was made on a bankruptcy arising in *Ireland*, but the rule was refused, that court thinking it a point of too much importance to be decided in a summary way; afterwards the defendant pleaded his discharge under the bankruptcy, but the court thought it was improperly pleaded; and the question was not again brought forward.

Per Curiam,

Rule refused.

(a) Which was admitted.

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CHILD against MORLEY.

A broker who contracts with others for the sale of stock at a future day by the authority of his principal, who afterwards refuses to make good the bargain, cannot by paying the difference to such third persons maintain an action on an implied assumpsit against his principal for the amount. If the

ASSUMPSIT for money paid laid out and expended for the use of the defendant; upon an account stated; for work and labour as a broker for the defendant, and on a quantum meruit; to which the defendant pleaded the general issue. At the trial before Lord *Kenyon* at *Guildhall* the case appeared to be this.

Morley, being possessed of 10,000 l. 3 per Cent. consolidated stock, applied to *Child* a stock-broker to sell it for him for the next opening, the stock being then shut. The defendant's direction to the plaintiff was to sell at 60 if he could, if not for 59 and a fraction. *Child* accordingly bargained with two persons, *Rutt* and *Shepherd*, for the sale of this stock at 59 and a fraction for the next opening, not disclosing to them at the time the name of his principal. In the mean time and before the transfer day the stock rose to 62. The defendant being afterwards called upon to make good his engagement to the purchasers refused so to do, alleging that the plain-

principal were really possessed of the stock so bargained to be sold, such contract is not illegal within the stat. 7 G. 2. c. 8 against stock-jobbing, although the broker did not disclose the name of his principal at the time of the bargain made; and the purchaser may maintain an action for the difference against the principal.

tiff had exceeded his authority in selling at too low a price. Whereupon the plaintiff, considering himself bound as the broker who had contracted with *Rutt* and *Shepherd* for the sale of the stock to make good his engagements to them, paid them the difference of the price of the stock when bargained for and when it ought to have been transferred, amounting to 576*l.* 8*s.*, and brought this action against *Morley* to recover that sum, and a further sum of 12*l.* 10*s.* for his commission as broker on the sale of the stock. And the jury under Lord *Kenyon*'s direction found their verdict for the amount of the two respective sums, discriminating at the time between them.

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A rule was obtained by *Law* in the last Term, calling on the plaintiff to shew cause why the verdict should not be set aside on several grounds; 1st, Because the transaction for the sale of the stock, as between the plaintiff and *Rutt* and *Shepherd*, was illegal and void within the statute 7 *Geo.* 2. c. 8. against stock-jobbing; and the purchasers could not have enforced the contract against the plaintiff, there being no stock in his name to be transferred. 2dly, Because no person can make another his debtor by a voluntary payment of the other's debt due to a third person; more especially in this case, when by the defendant's refusal to pay the money to the purchasers of the stock there was a direct notice to the plaintiff not to pay it. 3dly, Because, considering the relation in which these parties stood to each other, that of principal and agent, the plaintiff as agent had no right to pay money for his principal against his consent, in order to found an action against him, even admitting that the principal was bound to pay it to third parties; for the agent in these transactions is the only witness for his principal, and the latter thereby loses the benefit of his testimony. 4thly, Because at any rate this form of action was misconceived; if the plaintiff had been damnified by the defendant's neglecting to transfer the stock, he should have brought an action on the case for the special damage.

Erskine, *Garrow*, and *Henderson*, now shewed cause against the rule. As to the first ground of objection to the verdict; This is not a case within the statute against stock-jobbing; for that only applies to cases where there is an agreement for the transfer of stock, the pretended seller having really no stock to transfer, nor any actual sale being within the contemplation of the parties, but a mere gambling for the difference of the price between the times of making and executing the bargain. But here *Morley* was

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actually possessed of the stock bargained to be transferred and he commissioned *Child* as his broker to dispose of it for him; and though the bargain was made in *Child's* own name, without disclosing his principal, yet that cannot vary the nature of the case, which was a bonâ fide agreement for the sale of existing stock by an agent properly authorised by his principal. By the 7th section of the act of the 7 Geo. 2. c. 8. if stock agreed to be purchased at a future day shall not be transferred, the party to whom it was to have been so transferred may purchase the like quantity of other stock at the market price, and recover the difference in damages on the breach of the contract. 2dly, If the contract were legal within the statute, then as the plaintiff did not name his principal to the purchasers at the time, and as they might have sued him for the difference, he was under a legal obligation to pay the money. But supposing that by a disclosure of his principal he could have shifted the responsibility from himself to his principal, yet if the latter were legally bound to perform the contract, the plaintiff was under a moral obligation to pay the amount, which is sufficient to sustain this action. His own character in his business was at stake unless he made good the contract which he had entered into without naming his principal. It is the common course of business on the *Stock Exchange* for the brokers to make engagements in their own names for the transfer of stock without disclosing their principals, and credit is in those cases given to themselves personally; they stand therefore in the nature of guarantees for the due performance of such contracts on the part of their principals. The third objection would have great weight if by the payment of the money to *Rutt* and *Shepherd* by the plaintiff he had altered the situation of the defendant, his principal: but that was not the case here; for it was competent to the defendant to have made any defence to this action which he could have done to an action brought against him by *Rutt* or *Shepherd* for not transferring the stock. If the contract were illegal within the act of parliament, the plaintiff by voluntarily paying the money could not raise an assumpsit against the defendant. Neither could the plaintiff's testimony have been of any avail to the defendant in this case; for the defence set up was not that supposing the plaintiff to have been properly authorised by the defendant to sell the stock on the terms which he did, the defendant would not have been bound by that bargain, but the dispute was whether or not the defendant had given authority to the plaintiff at all to sell at such a price. This was therefore a question properly to be tried between

between these parties, and could be tried more advantageously for the defendant in this than in any other form; because now the plaintiff could not give evidence for himself, as he might have done in an action brought by *Rutt* or *Shepherd* against the defendant, but was obliged to prove his authority by other testimony. 4thly, As to the form of the action; although perhaps the plaintiff might have brought his action on the case for damages, yet he may waive the tort and bring his action in this form; for if the case proved would have been a sufficient consideration for an express promise to pay by the defendant, it will also be sufficient to raise an implied assumpsit in law, on the ground that the payment made by the plaintiff for the defendant was what the latter was legally and morally bound to have made, and that the plaintiff has so done in consequence of having been placed in a situation of responsibility by the act of the defendant. But at all events as the jury have severed the sums for which the action was brought in their verdict, the plaintiff is entitled to recover the 12*l.* 10*s.* for his commission as broker, for which the defendant was answerable to him alone.

Lord KENYON Ch. J. There is no pretence to say that this is a stock-jobbing transaction within the statute. The parties intended a bonâ fide sale of stock, of which *Morley*, on whose account it was sold, was then actually possessed; and the question is whether this may not be done through the intervention of a broker though he does not disclose his principal at the time; of which no doubt can be made. Nothing can be more unjust than the defence which has been set up to the whole of this demand; and that consideration may at first view of the case have tended to warp my judgment. But I cannot perceive what benefit the defendant can propose to himself by such conduct; for the Court have no doubt but that at all events the verdict must stand for the 12*l.* 10*s.*, the amount of the plaintiff's commission as broker, under the count for work and labour. And I think that some method or other will be found for making the defendant pay the amount of the difference which the plaintiff has honourably settled on account of his principal's not making good his engagement. But as to that part of the demand, there is a difficulty in the form of action; and perhaps it would have been better framed *ex delicto* than *ex contractu*. I admit that no man can by a voluntary payment of the debt of another make himself that man's creditor, and recover from him the amount of the debt so paid: but what pressed on my mind was that the plaintiff was under some sort of compul-

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sion to pay the differences. We know that it is the common practice on the *Stock Exchange* for the broker who is employed to sell stock not to disclose the name of his principal at the time of making the bargain; and the buyer deals with him upon the confidence of his character. Therefore I considered that his character was at stake in making good the engagement he had entered into on behalf of his principal; and having been placed in that situation of responsibility by the act and procurement of the defendant, I considered that his paying the differences under such circumstances was not altogether a voluntary act, but done under the pressure of a situation in which he was involved by the defendant's breach of faith. I remember a case in *Rolle's Abridgment* where a party met to dine at a tavern, and after dinner all but one of them went away without paying their quota of the reckoning, and that one paid for all the rest; and it was holden that he might recover from the others their aliquot proportions. If the plaintiff here had been bound as guarantee for the defendant to the purchasers of the stock, there could have been no doubt but that he might have recovered his whole demand in this action. However upon the whole, considering the difficulties of the case in its present shape as to the sum recovered for the differences, I think it would be better to frame another action for this part of the demand better adapted to the nature of the case.

LAWRENCE J. My difficulty is this; if *Child* contracted to sell the stock on his own account, then the case falls directly within the prohibition of the act of parliament, because he really was not possessed of the stock so bargained to be sold. But if he acted as broker or agent for *Morley*, which he legally might, and his contract would then be valid within the statute, he ought in that case to have permitted *Morley* to settle or not with the purchasers as he pleased; and the plaintiff should not have taken upon himself to pay the money without the consent of his principal, more especially after that principal had refused to pay it. In this general view of the case the payment by the plaintiff would be at his own peril, and he could not recover in this action as for money paid to the use of the defendant. The only ground on which (as it seems to me) the verdict in this case could have been supported for the whole demand was by considering the plaintiff as standing in the situation of a guarantee for the sale of the stock to the purchasers. Taking the transaction as now disclosed to be legal within the statute, there could be no objection to the plaintiff's becoming the guarantee of such

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such a legal contract; and then if he had paid the money on the default of the defendant, he would have stood in the common situation of a surety paying money for his principal; and it might have been a question whether, if by the general usage of the Stock-Exchange brokers contracting for the sale of stock and not disclosing the names of their principals were considered as impliedly pledging their own credit for the faithful performance of the contract, such general usage might have been deemed equivalent to an express guarantee on the part of the plaintiff, and then the money paid by him in default of his principal would have been money paid to the use of the defendant. But difficulties occur in this view as the facts now stand, and therefore it seems more proper that the verdict should only be entered up for the amount of the brokerage.

Per curiam,

Ordered accordingly.

The KING *against* EDWARD LOVEDEN LOVEDEN.

Saturday,
June 21st.

THE defendant, as Sheriff of the county of *Brecknock*, was fined for non-attendance at the assizes by the justices of that circuit, the record of which fine having been removed at the instance of the defendant into this court by certiorari appeared to be as follows;

“*Brecon*, to wit, Be it remembered that at the Great Sessions and gaol delivery of our lord the King for the said county, holden at *Brecon* in the said county on *Saturday* the 30th day of *March* in the 39th year of the reign &c. before *George Hardinge* and *Able Moysey* Esquires, justices of our said lord the King of the Great Sessions of the said county, assigned to deliver the gaol of the county afore-said of the prisoners therein being, and also to hear and determine divers felonies &c., *E. L. Loveden* Esq. High Sheriff of the said county is duly and solemnly called to appear and give his attendance at this same Sessions, to do and perform those things which to his office do belong and appertain, and as by his Majesty's writ in that behalf to him directed and delivered he is commanded; and the said *E. L. Loveden* High Sheriff as afore-said not accordingly appearing and attending at this same Sessions in obedience to his Majesty's said writ or otherwise to perform the said duties of his office, but contemptuously making default, therefore it is ordered that the said *E. L. Loveden* be fined, and he is accordingly

This Court will not mitigate a fine imposed by an inferior court, the record whereof is removed here by certiorari.

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by the Court here fined and amerced in the sum of 100*l.* to be by him forfeited and paid to the use of our said lord the King for such his contempt and default aforesaid. And it is further ordered that a levary do issue under the seal of this Court to the coroners of the said county or one of them, thereby commanding them or one of them to levy the said fine out of the goods and chattels lands and tenements of the said *E. L. Loveden*."

At the same time was returned the following ;

" *Breconsbire*, to wit, An extract of a fine set and imposed at the Great Sessions held at *Brecon* in and for the said county on *Saturday* the 30th day of *March* in the year &c, 1799, before *George Hardinge* and *Abel Moysey* Esquires, justices &c.

SAMUEL PRICE	} Esquires, Coroners of the said county.
and	
JOHN WILLIAMS	

(a) *E. L. Loveden*, Esq. High Sheriff of the said county, because he came not in his proper person to do and perform those things which to his office belonged, as by his Majesty's writ of summons to him directed and delivered he was required, therefore he is in mercy, and his fine is set at 100*l.*

(Signed) *Wilkes*, Prothonotary and Clerk of the Crown."

The defendant hereupon obtained a rule (b) to shew cause why the proceedings touching the fine imposed upon him should not be quashed for insufficiency, or if not quashed why the fine should not be mitigated.

When this case was called on,

Lord KENYON Ch. Just. suggested a doubt how far it was competent to this Court to do what was required by the rule, namely, to mitigate this fine, for that they could not do this without entering into the merits of the question which they had no legal means of bringing into controversy before them.

Erskine and *Law*, for the defendant, said they were prepared to bring the merits of the question before the Court upon affidavit ; and cited an anonymous case in 1 *Ventris* 336, where one being brought up by habeas corpus who had been imprisoned by the Quarter Sessions for non-payment of a fine of 20*l.* set by the

(a) This extract of the fine was returned at the same time as the record itself of the fine.	(b) This rule was served on the two justices by whom the fine had been imposed.
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justices there upon him, the record of which fine was at the same returned by certiorari, this Court thought the fine had been improperly set for the cause returned, and said "they were to judge of such fines, whether without cause, or to mitigate them when excessively imposed." They added that the authority of this Court to examine all criminal matters arising within inferior jurisdictions when brought before them by certiorari was founded upon their general superintending power in respect of all criminal matters: but they admitted that they could not find any other authority than that in *Ventris* in support of the power of this Court to mitigate fines imposed by inferior courts.

Lord KENYON Ch. J. In that case the Court were of opinion that there was no ground at all in point of law for imposing the fine for the reason assigned by the Quarter Sessions; and so far the case may be considered as an authority: but beyond that the dictum that this Court may mitigate a fine so imposed seems to be very loose and unsatisfactory; and I should require much consideration before I gave my assent to it.

The defendant's counsel then suggested that there was error appearing on the record here for which the Court might quash the fine altogether, for the fine was grounded upon a supposed breach of duty by the defendant in not giving his personal attendance at the assizes as required by the King's writ of summons; but that is not made necessary by any law.

The Attorney General and *Bevan* said, in answer, that previous to every Great Sessions by warrant from the Chief Justice of the circuit a general writ of summons in the name of the King is issued by the prothonotary to the sheriff, by which the sheriff is, amongst other things, commanded (a) to proclaim throughout his county that the general Great Sessions is to be holden at such a day and place, and that he cause to be warned all the justices of the peace &c, to give their attendance at such Sessions to do those things which by the justices shall be enjoined them; and that the sheriff himself his bailiffs and ministers *be then there in their proper persons*, with all writs &c., and furthermore to do those things which to his office belong. And in the return to such writ, signed by the defendant as sheriff, he says that "I am personally present with all my officers" &c. Besides which the Stat. 34 & 35 H. 8. c. 26. for regulating the jurisdiction in the Principality of Wales,

(a) The writ of summons itself was read by the counsel, of which what is here stated is the substance.

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by *Seet.* 65. requires all sheriffs &c to be obedient, *attendant*, and assisting to the justices of *Wales* &c.

The defendant's counsel then renewed their application to the Court for a mitigation of the fine upon the circumstances of the case which they disclosed by an affidavit.

Lord KENYON Ch. J. I am not satisfied that we have any authority to mitigate the fine: but there is another forum, the Court of Exchequer, before which matters of this kind frequently come. I think however that the *Welsh* revenue of the crown is more immediately subjected to the control and management of the Auditor and Treasurer of *Wales* (a), and does not go into the Exchequer at all. But still that Court by virtue of its general superintending power in matters of revenue may I apprehend upon the constat (b) of the fine returned to them give such redress as justice shall require (c). All the crown rents payable out of the principality of *Wales* are accounted for to the auditor of *Wales*; yet the officers of that establishment are under the jurisdiction and control of the Court of Exchequer, as appears from the report of the case of *Roberts v. Myddleton*, the last in *Bunbury*. His Lordship then suggested whether it might not be convenient to suspend this rule till the determination of the Court of Exchequer was made known. But

The Attorney General expressing a doubt whether the Court of Exchequer could give relief in this case, and intimating that relief might more easily be obtained in another manner (d), upon the facts stated by the defendant's counsel being properly substantiated,

The Court, after some hesitation, said that upon the whole they were of opinion that it would be the most beneficial course for the defendant to have this rule discharged, as the pendency of it might embarrass his application to any other quarter.

Rule discharged;

And a procedendo awarded to remit the record back to the Court of Great Sessions.

(a) By *Seet.* 52. of the Stat. 34 & 35 H. 8. c. 26. the King shall have all fines issues amerciaments and all forfeitures of the recognizances lost or forfeited before any of the justices in Sessions: and the prenotaries within the limits of their offices shall yearly estreat the same into the *Exchequer* appointed for that circuit; and see *Seet.* 60. a similar provision as to fines &c. before justices of peace.

(b) This is a certificate or exemplification of the record, certifying what does *constare* upon record, and is of a higher nature than an ordinary certificate. Vid. Stat. 3 & 4

Ed. 6. c. 4. 13 *Eliz.* c. 6. and *Co. Lit.* 225. b.

(c) The Court of Exchequer have a power of mitigating fines &c. in any matter cognizable by them where the king is party. Vid. Stat. 33 H. 8. c. 39. s. 57.

(d) Relief has been sometimes granted upon petition to the Lords Commissioners of the Treasury, who refer the matter to the Attorney General to make a report to them thereon; and if such report be favorable to the petitioner, the crown will thereupon remit or mitigate the fine.

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AUSTEN *against* GIBBS.Monday,
June 23d.

THE plaintiff was nonsuited on the first trial at the Spring Assizes 1799 at *Maidstone* on the opinion of the Judge in point of law upon the effect of certain evidence. In *Easter* Term following a new trial was granted on an application to this Court, and the costs were directed to abide the event; and the plaintiff obtained a verdict at the last Summer Assizes. On taxing the costs in last *Hilary* vacation the Master allowed the plaintiff only the costs of the last trial, being of opinion that the rule was that in case the same party succeeds again on a second trial he shall have the costs of both trials, but if the verdict be different on the second trial from what it was on the first, then the party succeeding on the second trial shall only have the costs of that trial allowed.

When upon setting aside a nonsuit the costs are directed to abide the event, though the plaintiff succeed on the second trial he is not entitled to the costs of the first; neither is the defendant entitled to the costs of the first trial in such case. But when the same party succeeds on both trials he is entitled to the costs of both.

Adam now moved that the Master might review his taxation of costs, and allow to the plaintiff the costs of the former trial and of the motion for setting aside the nonsuit thereon, agreeably to the rule of Court obtained by the plaintiff for setting aside such nonsuit. He contended that the meaning of the order that the costs should abide the event must be that if it finally appeared that the plaintiff ought to have recovered in the first action, he should receive the costs of that action as well as of the second where he actually recovered. And he cited a late case of *Doe v. Elliott*.

Garrow and *Marryat* opposed the application in the first instance, and relied on the cases of *Rouse v. Bardin* (a), *Trelawney v. Thomas* (b), and *Haukey v. Smith* (c), and on the practice as reported by the Master.

LORD KENYON Ch. J. It was only decided in the case of *Doe v. Elliott* that where a new trial was granted, with a direction that the costs should abide the event, if the party who failed on the first trial succeed on the second, he shall not pay to the other the costs of the first trial, nor the costs of the rule for obtaining the second trial. But it does not follow that he is to receive from the other party who succeeded the costs of the trial in which he himself failed; and it seems unreasonable that he should. Therefore

Per Curiam,

Rule refused.

(a) 1 H. Bl. 639.

(b) Ib. 641.

(c) *Ante*, 3 vol. 507.

1800.

Wednesday,
June 25th.The KING *against* The Inhabitants of RUDGELEY.

If a feme covert be removed by an order of two justices from A. to B., describing her as "widow," and there be no appeal against it, it is conclusive not only as to her settlement but as to that of her husband also.

TWO Justices by an order removed *Emanuel Smith*, and *Elizabeth* his wife, from *Acton Trussell* to *Rudgeley* both in the county of *Stafford*; on appeal the Court of Quarter Sessions confirmed the order, and stated the following case for the opinion of this Court.

By a certificate dated the 4th of *March* 1727, directed to the churchwardens and overseers of *Acton Trussell*, the then officers of the parish of *Rudgeley* acknowledged *John Smith Joyce*, his wife, and his son *Emanuel Smith*, (the pauper,) then about three months old, to be inhabitants legally settled in the parish of *Rudgeley*. About forty years ago the pauper *Emanuel Smith* was married in *Gloucester* to *Elizabeth Gettens*; they parted in the year 1787, and since that time never saw or heard of each other until after the removal next mentioned. By the following order of two magistrates the said *Elizabeth* was removed on the 9th of *November* 1799 to *Acton Trussell*. [Here was set forth an order signed by two magistrates for removing her by the name and description of "*Elizabeth Smith* widow" from the parish of *St. George Hanover Square* to *Acton Trussell*.] There was no appeal against the last mentioned order."

Leycester and *Touchett* in support of the order of sessions. On the part of *Acton Trussell* it may be sufficient to observe that the settlement of the pauper *Emanuel Smith* was acknowledged to be in the parish of *Rudgeley* in the year 1727, and that he has since done no act himself to gain a settlement in any other parish; the consequence of which is that the magistrates were justified in removing him and his wife from *Acton Trussell* to *Rudgeley*. It will however be contended on the other side that, whatever may have been the original settlement of *Emanuel Smith*, it must be considered that he is now legally settled at *Acton Trussell*, because his wife was removed to that place in the year 1799, and there having been no appeal against that order of removal that order is conclusive as to the settlement of the husband as well as the wife. But though the general rule, that an order of removal unappealed against is conclusive, may be admitted, the application of that rule to this case may well be doubted. This was not a removal of *Emanuel Smith* himself nor of his wife, as *the wife* of *Emanuel Smith*, but

simply

simply of *Elizabeth Smith widow*, which gave no notice to *Acton Trussell* that the settlement of *Emanuel Smith* would be disputed on an appeal against that order of removal. *Elizabeth Smith* having been removed, not as the widow of *Emanuel Smith*, but generally as *widow*, the parish to which the removal was made were only induced to inquire into the settlement that she herself might have gained; and, as a widow, she might have gained a settlement in her own right after her supposed husband's death in various ways. That order of removal therefore, though it were unappealed from, ought not to conclude the settlement of her husband, since *Acton Trussell* to which place the order was made had no notice that the settlement of *Emanuel Smith* would thereby be drawn in question. If the cases of *R. v. The Inhabitants of Leigh* (a), *R. v. The Inhabitants of Hincksworth* (b), *R. v. The Inhabitants of Towcester* (c), and *R. v. The Inhabitants of Silchester* (d), be cited by the counsel on the other side, it may be answered that (as to the first) the woman was removed as a married woman, and in the second she was removed as "*the wife of J. Griffin*," and therefore the other parishes had notice by the orders themselves that the respective settlements of the husbands were in dispute; that the third case (*R. v. Towcester*) passed sub silentio, the case not having been argued at the bar, nor any reasons given by the Court for its decision; and that as to the other case (*R. v. Silchester*) where an order of removal of *A.* and of *B.* his wife unappealed against was holden to be conclusive as to the settlement of both, though it afterwards appeared that *B.* was not the wife of *A.*, the names of both persons removed were mentioned in the order, and therefore the other parish had notice that the settlement of both might come in question. But here no such information was communicated to the parish to which the removal was made; and therefore those cases ought not to govern the present. And if the order in *November 1799* be not conclusive as to the settlement of the husband, neither can it be conclusive as to the settlement of the wife, because the effect of that would be to separate the husband from the wife.

Benyon and Clifford contra. Two questions arise in this case; the first, whether or not the former order, by which the wife was removed to *Acton Trussell*, be conclusive that her settlement is in that parish; the second, if it be, whether or not it be also conclusive as to the settlement of her husband; if it be only conclusive as to

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RUDGLEY.

(a) *Dougl.* 46.(b) *Ib.* n. 13. and *Cald.* 42.(c) *Cald.* 47.(d) *Burr. S. C.* 551.

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against
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tants of
RUDGELEY.

the former, the consequence is that the present order of removal must be quashed in part, if conclusive as to the latter, it must be quashed in toto. First; it seems to be admitted as a general rule that an order of removal unappealed from is conclusive as to all the world: but an attempt has been made to take this out of the general rule. It would however be dangerous to introduce such an exception to the general rule, if the question were new: but the principle, on which the cases alluded to have been decided, must also govern this case. In the two first cases mentioned the wife only was removed, and yet it was holden that the order was conclusive as to the settlement of the husband also. The same decision was also made in *R. v. Towcester*, where the woman was removed as to the place of *her* settlement without describing her as a wife, or taking any notice of the husband; and the Court in deciding that case did not introduce a new principle; they merely acted upon that established in the former cases. The ground of all those decisions is this, that the parish to which the removal is made are bound to inquire into the mode by which the party removed, whether a maiden wife or widow, gained her last settlement; and if they do not make this inquiry at the time, they are afterwards estopped to dispute the order. And this is a stronger case than that of *R. v. Towcester*, because here the woman was described as *widow*, which imported on the face of the order that she had gained some settlement subsequent to her maiden settlement. The observation that that case passed sub silentio affords a different inference from that drawn from it by the other side; it may be presumed that the counsel, who were to have argued it, thought that it fell within the former cases and therefore declined arguing it. The case of *R. v. Silchester* is also strong to shew the general principle now insisted upon; for there *B.* having been removed as the wife of *A.* the order was holden to be conclusive on the woman though she was not the wife of *A.* So in *R. v. Woodchester* an order for the removal of *A.* and *B.* his wife was holden to be conclusive as to the settlement of after born children, though in fact *B.* were not the legal wife of *A.* There are also many cases to shew that an order unappealed from is conclusive, though the party be described by a wrong addition. The argument on the other side, that the consequence of a determination that the former order is conclusive as to the husband, will lead to a separation of the husband and wife, is not well founded, because it must now be presumed that the wife was properly removed

removed to *Acton Trussell* as the place where the husband was settled, and the more so that it is not stated that the woman herself was ever there; and therefore a decision that the former order is not conclusive as to the husband will operate as a separation.

GROSE J. (a) The question is whether or not the former order by which the pauper's wife was removed to *Acton Trussell*, and against which there was no appeal, be conclusive as to the settlement of the persons removed by the present order? Nothing is more convenient in every part of the law than certainty, and especially in cases of this kind when it is considered that those who are to sit in judgment at the sessions are, generally speaking, not members of our profession; it is therefore of great consequence that we should abide by what has been already decided on settlement cases. The general rule that an order of sessions unappealed against is conclusive seems to be admitted. The cases alluded to prove it; they also shew that the same rule extends to an order removing a married woman. It is said however that though this rule was applied in two of the cases cited to a woman removed as a feme-covert, it ought not to be extended to a case where the woman removed is not described as a married woman, and that the case of *R. v. The Inhabitants of Towcester* where it was so extended is not to be considered as of any authority because it was not argued at the bar: but I rather believe that the counsel who were to have argued the case of *R. v. Towcester* thought the point so clearly settled that they had no hopes of inducing the Court to depart from the opinion which they had given in the two prior cases, and therefore they abandoned it. Then if we were to determine in this case that the former order of removal was not conclusive, we should shake the authority of all the decisions on this subject. It was objected by the counsel who argued in support of the order of sessions that the former order gave no notice to the other parish that the husband's settlement would be litigated under it, because she is only described as "widow" generally, without saying of whom she was the widow. But this imported that she was removed to a parish where her husband had gained a settlement; at least it put that question in issue; therefore it behoved the parish to which the removal was made to inquire how that settlement was gained. This would have been an object of inquiry on an appeal against that order. But as that parish did not then litigate the question, we are bound according to all the authorities

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(a) Lord Kenyon Ch. J. was attending the Privy Council on appeals in prize causes.

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tants of
RUDGELEY.

to determine that the former order of removal is conclusive, and that not as to her only, but as to the husband likewise. The consequence is that this rule must be made absolute.

LAWRENCE J. The Counsel in support of the order of sessions admitted that the case of *R. v. Hincksworth* must be considered as an authority as far as it professes to decide, but they attempted to distinguish that case from the present, by saying that the order in that case conveyed a notice to the parish to which the removal was made that it involved in it the husband's settlement, and they seemed to admit that if a similar notice had been conveyed in the former order in this case it would have been sufficient. Now I think that this order did upon the face of it point out that the husband's settlement might come in question under it; for the woman was removed *as a widow*, in which case the presumption is that she was removed to the place where her husband was settled. Therefore that parish either did then inquire as to the husband's settlement and were satisfied that there was no ground for an appeal, or they made no inquiry on the subject, but acquiesced under the order of removal: but in either case I think on the authority of the former cases that the former order is conclusive as to both these parties.

LE BLANC J. I am also of opinion that the former order of removal is conclusive as to the settlement of both the persons now removed. The general rule that an order of removal unappealed from is conclusive is admitted; it is likewise admitted that an order of removal of a wife, as such, is conclusive not only as to her but as to her husband. Then the question here is whether or not the removal of a wife by a wrong addition makes any difference in this respect? And with regard to that point, the cases of *R. v. Silchester* and *R. v. St. Mary Lambeth* (a) shew that an order of removal unappealed from is conclusive though the party be removed by a wrong addition; for in both those cases the woman was removed as the wife though in fact she was not the wife, and yet it was holden that the parties were precluded by the orders from disputing the settlements again upon subsequent removals. The result of all the cases on the subject seems to be this; an order of removal unappealed against is conclusive; an order of removal of a woman, though not as wife, is conclusive as to the settlement of the husband as well as the wife; and the circumstance of the party being removed

(a) *Ante*, 6 vol. 615.

under a wrong description does not take the case out of the general rule.

Per Curiam,

Both orders quashed.

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against
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tants of
RUDGELEY.

The KING *against* JUKES and Others.

Wednesday,
June 25th.

THE defendants, having been convicted on the statute 36 Geo. 3. c. 60. s. 3 & 4. for selling upon certain cards and papers metal buttons marked respectively "double gilt" and "treble gilt," the respective buttons not being double gilt or treble gilt, appealed to the sessions at *Warwick*, where the conviction was affirmed. Afterwards the record was removed into this Court by certiorari, and the conviction was quashed for a defect in the information, it not being therein negatived that they were pattern cards or papers (vide *Sup.* 542.) After this Court had given judgment and quashed the conviction, a rule was obtained by the prosecutor calling on the defendants to shew cause why the rule (for quashing the conviction) should not be discharged, and why the certiorari and the record of conviction returned thereto should not be taken off the file, and the certiorari re-delivered to the two justices (who had convicted the defendants) for the purpose of their returning a record of conviction reciting the information as it was in fact exhibited to them, or why a mandamus should not issue commanding those two justices to proceed upon the said information. This rule was obtained on an affidavit, stating the original information, in which the exception mentioned in the statute, of their being pattern cards, was negatived.

Gibbs, Holroyd, and Perkins, now shewed cause against that rule. This rule is neither warranted by principle or precedent. With regard to the first branch of the rule, which is in effect a rule to amend; it may be questioned how far the Court can amend. It has always been considered that no amendment could be made at common law either in criminal or civil proceedings after the term in which the record is made up; and though in certain civil cases the Courts may amend by different statutes in subsequent stages of the proceedings (8 Co. 157.), none of those statutes apply to criminal proceedings. And here the record was complete before it was returned to this court by certiorari. But even if the Court have the power to amend, they will not in their discretion exercise it in

The defend-
ants appealed
to the sessions
against a
conviction
on a penal
statute,
where the
conviction
was affirmed:
afterwards
the record
was removed
here by cer-
tiorari,
where the
conviction
was quashed
for a defect
in the infor-
mation;
then the
prosecutor
moved either
that the
certiorari
should be
sent back to
the magi-
strates in
order that
they might
return the
original in-
formation,
(which had
not the de-
fect,) or that
a mandamus
might issue
to compel
the magi-
strates to
proceed on
the original
information;
but this
Court re-
fused to
make such a
rule.

1806.
 The KING
 against
 JAMES.

this instance. In *Steel, qui tam, v. Sowerby* (a), Lord Kenyon said "It has been at all times considered against the policy of the law that penal actions should be kept suspended over the heads of defendants." It must be remembered that making up the record of conviction is the act of the magistrates in which they are generally assisted by the prosecutor, but in which the defendant can take no part. Here the record of conviction was returned to the Sessions, where an appeal was heard, and upon the hearing of which it was not suggested that the record was inaccurate: it was afterwards removed into this court, where it was adjudged that the conviction could not be supported for want of that very allegation which it is the object of the prosecutor by means of this rule to introduce; but on the argument here it was not even insinuated by the prosecutor that the information on which the conviction was founded was not the same information that formed part of the record; and it would therefore be unjust as far as respects the defendants to make the former part of the rule absolute. If in drawing up the record the magistrates omitted any material part for the purpose of protecting the defendants from the penalties of the law, that may be a ground of complaint against the magistrates, but the defendants ought not to be prejudiced by it. It would be unjust on the defendants in another point of view; they have been put to great expence in contesting this question; it turned out that in the opinion of this Court the objection they took to the conviction was well founded; and if the record had been originally drawn, as the prosecutor now wishes it, they would have avoided all that expence. Besides which, if the information be now amended, the defendants will be deprived of all opportunity of appealing against it, since they must appeal (if at all) to the Sessions *next* (b) after the conviction: but that time has now elapsed. The second branch of the rule is equally objectionable, because if the magistrates are to proceed again on the original information, the defendants will be twice called upon to answer the same charge.

Law and Clarke in support of the rule. First, this is neither in form or in substance a motion to amend: the object of the rule is merely that the information, in its original state without any alteration or amendment, may be returned to this Court, in order that this Court may see whether or not the defendants were properly convicted. It cannot be imputed to the prosecutor as a fault either that the record returned by the certiorari was not properly

(a) *Ante*, 6 vol. 174.

(b) Stat. 36 Geo. 3. c. 60. s. 9.

drawn, or that he carried on the proceedings to this stage without endeavouring to correct the error: It was the duty of the magistrates, not of the prosecutor, to take care that the information as set out in the record of conviction was a true copy of the original information exhibited before them; and if the magistrates set forth an untrue copy, it was the business of the defendants, not of the prosecutor, to discover it at an earlier stage: but the objection on which this Court quashed the conviction was not taken at the Sessions. This motion appears to be warranted by *Plume's* case, 4 *Vin. Abr.* 343. cit. *Latch* 210. "A. was indicted of murder in *Essex* and outlawed, and the outlawry certified in B. R., but as certified it is erroneous, because the exactus is ad comitatum without saying meum. The Attorney General shews that the King had seized the lands, and for assuring the King's estate and to prevent the reversal of outlawry prayed a certiorari to the coroners whether the exactus was ad comitatum (without meum,) and upon their return to amend it; and there was a precedent in the time of *Ed. 4.* where one *Stanly* was indicted and was in some places written *Staveley*. And a certiorari was awarded here by the Court." At all events there can be no injustice in granting the second part of the rule, because it cannot be considered that the defendants have ever answered to the original information. They have yet only answered to a defective information, the acquittal or conviction on which cannot be pleaded to the original information. And if the magistrates now proceed on that information, the defendants will have an opportunity of appealing in case they should be convicted.

But *the Court* discharged the rule, the defendants undertaking not to bring any action either against the magistrates who convicted or those who acted under them. They said it would be unjust to grant this rule; that this must be considered either as an application for leave to proceed de novo, in which case the defendants would in truth be called upon twice to answer the same charge; or as an application in effect to correct the original information, in which case the defendants could have no opportunity of appealing.

Rule discharged.

1800.

The KING
against
JUKES.

1800.

Friday,
June 27th.SHIVERS *against* BROOKS.

The plaintiff may sue out a writ against the bail, on their recognizance, on the return day of the ca. fa. against the principal.

THIS was an action of debt on a recognizance of bail taken in a suit between the plaintiff and *Leigh Blundell*; and there was a special memorandum that the bill was filed on *Monday* next after the *Morrow of St. Martin* in *Michaelmas* Term; to this the defendant pleaded that no writ of *capias ad satisfaciendum* was sued out against the principal and returned by the sheriff before the commencement of this action. The plaintiff replied that before the exhibiting of his bill, *ff.* on the 12th of *November* last, the *capias ad satisfaciendum* was sued out returnable on *Saturday* next after the *Morrow of St. Martin*, to which the Sheriffs of *London* on the return day returned that the principal was not found &c. The defendant rejoined that on the 16th of *November*, being the return day of the *capias ad satisfaciendum*, the plaintiff sued out the *latitat* in this cause, returnable on *Wednesday* next after eight days of *St. Martin*. To this there was a *sur-rejoinder*, that the plaintiff on the said *Wednesday* next after eight days of *St. Martin* and at no time before exhibited his said bill against the defendant, entitled on *Monday* next after the *Morrow of St. Martin*. To the *sur-rejoinder* there was a *demurrer*, assigning for causes of *demurrer* that the *sur-rejoinder* was repugnant to and a departure from the allegations contained in the replication, and was inconsistent with the memorandum and entitling of the bill exhibited in this cause.

Yates in support of the *demurrer*. It will be admitted by the plaintiff that the *latitat* issued in this case must be considered as the commencement of the action, though had it not been pleaded as it is, the bill would have been considered as the beginning of the action. *Foster v. Bonner*, *Cowp.* 454. If so, it appears that the plaintiff has commenced this action too soon, since the *latitat* was sued out on the day on which the *capias ad satisfaciendum* against the principal was returnable. But the bail have the whole of the return day in which to render the principal, and therefore no writ should be sued out against them until after the expiration of that day. In *Hutchins v. Hird* (a), it was holden that the sheriff could not be ruled to bring in the body until the day after the expiration of the rule to return the writ, because the sheriff has the whole of that

(a) *Ante*, 5 vol. 479.

day to return the writ; and the reason of that determination equally applies to this case. But

Lord KENYON Ch. J. said, this precise point arose in the case of *Stewart v. Smith*, 2 *Ld. Raym.* 1567 (a). where it was decided that a scire facias may be sued out against the bail on the day on which the capias ad satisfaciendum is returnable, because the Court will intend that it issued after the sheriff's return to the writ against the principal. And I am glad to find an authority to warrant us in over-ruling such an objection as the present, that does not affect the merits of the case, and is calculated to retard the plaintiff's remedy.

Per curiam,

Judgment for the plaintiff (b).

Manley was to have argued for the plaintiff.

(a) 2 *Str.* 365. S. C. The same point was also ruled in *Cruikshank v. Steward*, H. 17 *Geo.* 3. B. R. See 2 *Ld. Raym.* 1567. marg. oct. ed.

(b) This case was argued in the last term and this opinion given on the argument: but a few days afterwards Lord *Kenyon* said that the formal objection pointed out as a cause of demurrer appeared to be well founded, and therefore he desired that the judgment

given might not be entered up, but that the defendant might have another opportunity of being heard. The case was accordingly set down again in the paper for argument this day, and when it was called on the Court intimated to the plaintiff's counsel that it would be better to amend the memorandum of the time of filing the bill; whereupon *Manley* desired to amend on payment of costs, and it was granted.

BRIGGS *against* CALVERLY.

Friday,
June 27th.

ASSUMPSIT for goods sold and delivered, work and labour, and upon the common money counts. To this declaration there was a plea of tender of 3*l.* 12*s.* 1*d.* before the day of exhibiting the plaintiff's bill, and non-assumpsit as to the rest. Replication as to the plea of tender (protesting that the defendant was not always ready to pay the sum mentioned) that before the tender, to wit, on &c, at &c, the plaintiff for the recovery of his damages by him sustained by the non-performance of the several promises in the declaration mentioned retained one R. S. one of the attornies of the Court &c. as his attorney, and then and there instructed the said R. S. to commence and prosecute immediately an action in the said court against the said defendant at the suit of him the plaintiff in that behalf; and that the said R. S. as such attorney of the plaintiff then and there by virtue and in pursuance of such retainer and instruction as aforesaid, with all due diligence, viz, within six

It is no answer to a plea of tender before the exhibiting of the plaintiff's bill that the plaintiff had before such tender retained an attorney and instructed him to sue out a latitat against the defendant and that the attorney had accordingly applied for such writ before the tender which was afterwards sued out.

1800.
 BRIGGS
 against
 CALVERLY.

hours next following caused application to be duly made for a certain writ of latitat to be directed to the sheriff &c. against the said defendant at the suit of the plaintiff, and that afterwards and before such application for such writ as aforesaid could be countermanded by the said plaintiff by reason of the tender &c. by the defendant, to wit on &c. a certain writ of latitat was prosecuted by the said R. S. as such attorney of the plaintiff as aforesaid by reason of such application as aforesaid out of the said court &c. against the defendant at the suit of the plaintiff and directed to the sheriff &c, by which writ it was commanded &c.; which said writ was so applied for issued and prosecuted with the intent that the plaintiff might exhibit his said bill against the defendant for the recovery of his damages by reason of the non-performance of the said promises in the said declaration mentioned; at which day before our said lord the King at *Westminster* came as well the plaintiff &c. as the defendant &c, and thereupon the plaintiff exhibited his said bill against the defendant &c; that although the defendant a little time, to wit, twelve hours before the said writ was actually so issued and prosecuted as aforesaid tendered to the plaintiff the said sum of 3*l.* 12*s.* 1*d.* as in the said plea is set forth, yet the defendant did not at any time previous to the said plaintiff having so retained the said R. S. as his attorney as aforesaid and instructed him to commence and prosecute such action as aforesaid and to the said R. S. having caused an application to be made for such writ as aforesaid so afterwards sued and prosecuted thereupon in manner and form as aforesaid tender to the plaintiff the said sum of 3*l.* 12*s.* 1*d.*; and this the plaintiff is ready to verify &c. To this there was a general demurrer, and joinder.

When this case was called on in the paper,

Lord KENYON Ch. J. said it was impossible to contend that the tender came too late, it having been made before the commencement of the suit. That it would be introducing a most dangerous distinction to depart from that line on account of any previous steps taken by a party in contemplation of an action.

Per curiam,

Judgment for the defendant (a).

Scarlett was to have argued in support of the demurrer.

Littledale contra.

(a) Vide *Wood v. Newton*, 1 *Wils.* 141.

1800.

Friday,
June 27th.WILKES *against* WILLIAMS.

TO an action upon promises the defendant pleaded the following plea in abatement. "And the said *Walter* in his own proper person comes and defends the wrong and injury *when &c.*, and says that this Court ought not to take nor will take cognizance of the said plea, because he says that he the said *Walter* long before and at the time of exhibiting the said bill of the said *Joseph* and from thenceforth continually hitherto hath been and still is one of the resident officers, that is to say, a tipstaff of the High Court of Chancery of our lord the now King, the said Court then and still being held at *Westminster* in the county of *Middlesex*, and as such tipstaff during all the time aforesaid hath been and still is present and ready to obey the pleasure of our said lord the King and daily attendant in the said court of Chancery of our lord the King for the public good of his kingdom; and that he doth serve and intends to serve our said lord the King and his people as such tipstaff of the said High Court of Chancery of our said lord the now King, to wit, in the said High Court of Chancery; and the said *Walter* further says that as well for the royal dignity of our lord the now King and of his progenitors heretofore Kings of *England* as from an ancient custom in the High Court of Chancery of our said lord the now King and his progenitors aforesaid time out of mind obtained and hitherto allowed and approved of all the resident officers clerks and ministers of the same court of Chancery of our said lord the now King who are present and ready to obey the pleasure of our said lord the King and daily attendant in the said court of our said lord the King for the public good of his kingdom and their men servants lands tenements estates goods and chattels ought to be freed and quieted *as anciently used to be according to the liberties and privileges of the said Court of Chancery of our said lord the King time immemorially used*, and ought not by any means to be arrested impleaded imprisoned drawn or compelled to appear or answer before any of the justices judges officers and secular ministers whomsoever of our said lord the King (except before his Chancellor of *England* or keeper or keepers of the great seal of *England* for the time being) upon any pleas, complaints trespasses or demands whatsoever which do not touch his royal person (pleas of freehold felonies and appeals only excepted) or by reason of any summons or impannelling of a jury in any assizes or recognizances before the same justices judges

A plea in
abatement to
the jurisdiction
of the
Court, beginning
"defendit
vim et injuriam
quando &c," is
good.

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 WILKES
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officers or ministers to be taken or elected to execute any office of collector of subsidies tenths or fifteenths churchwardens constable tythingman scavenger surveyor of highways or overseers or collector for the poor or to watch or ward or any other office service or attendance elsewhere than in the said Court of Chancery of our lord the King whereby they may be withdrawn from his said court against their wills contrary to what they *formerly used to be*; which said custom privilege and liberties in the parliament of the Lord *Edward* the third progenitor of our said lord the King late King of *England* held at *Westminster* in the eighteenth year of his reign by the said King and by his earls and barons and others in the said parliament were admitted allowed and approved of, as by indorsement on a certain petition then before the said King in the said parliament exhibited and in the rolls of the said parliament enrolled it more fully appeareth; and this the said *Walter* is ready to verify; wherefore he prays judgment if the Court of our said lord the King before the King himself now here will or ought to take cognizance of the said plea against him the said *Walter*" &c.

The plaintiff demurred generally to this plea.

Larwes, in support of the demurrer, took several objections to the defendant's plea. First; the defendant has admitted the jurisdiction of the Court by making a full defence, "he comes and defends the wrong and injury *when* &c.;" and therefore cannot afterwards plead to the jurisdiction. In *Trunda'll v. Trowell* (a) it was holden that tenant in ancient demesne cannot after imparlance plead ancient demesne, for he hath made a full defence, for he says "defendit vim et injuriam quando &c.," which implies all the rest. So Lord Chief Baron *Gilbert* in his History of the Court of C. P. (b) says "The defendant must make but half defence; for if he make the full defence *quando* &c. he submits to the jurisdiction, &c. being *quando et ubi curia consideraverit*." Mr. J. *Blackstone*, (3 *Com.* 298.) adopted the same doctrine; "by defending the force and injury the defendant waived all pleas of misnomer; by defending the damages, all exceptions to the person of the plaintiff; and by defending either one or the other *when and where it should behove him* he acknowledged the jurisdiction of the Court." Again in *Gawen v. Surby* (c), where the defendant pleaded the outlawry of the plaintiff, the Court awarded a respondeas ouster, because the defence was "defendit vim et injuriam *quando*

(a) *Sty.* 273. Yet (the Reporter adds) it was ruled to be spoken to again. (b) Page 138.

(c) 1 *Lutw.* 5.

&c.," which was a full defence (a). Secondly; the custom is not pleaded as an immemorial custom in the usual form, and it should have been so pleaded to oust this Court of it's jurisdiction. But if it be taken to be pleaded as an immemorial custom, then it is open to another objection, for it is claimed as an exemption from several offices created by statute within the time of legal memory; scavengers, surveyors of the highways, overseers of the poor &c. Thirdly; the custom as stated is unreasonable, because it is not confined to the officers, but it also extends to their men servants, and even to their lands tenements &c. The reason on which such a privilege is founded is the attendance of the officers in the Court of Chancery: but their servants whose attendance in the court is not necessary do not come within the reason of the privilege. Fourthly; the custom is pleaded in too loose and indefinite a manner: it is said the officers "ought to be quieted as anciently used to be," without shewing what that ancient usage was; and that they may not be "withdrawn from his said court against their wills contrary to what they formerly used to be." Fifthly; the defendant does not by his plea give the plaintiff a better writ. In the Petty Bag Office in Chancery there is no jury process, consequently no issue can be tried there: and when an issue is joined in that court, it must be sent into this court to be tried, where also judgment is to be given; so that the consequence of allowing this plea to be good would be attended with this absurdity, that the defendant by the very privilege he claims will be subjected to the jurisdiction of this court which by his plea he is attempting to take away.

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Littledale contra was to have argued on the other side: but was stopped by

The Court, who said that there was no foundation for either of the objections. That the first was expressly overruled by the Court of Common Pleas in the case of *Alexander v. Mawman*, *Willes's Rep.* 40. after great consideration and referring to the former cases on the subject; and that after the point had been settled by so high an authority it ought now to be considered as at rest. That the defendant here had only made the half defence; that, in general, the "&c." would imply only the half defence in cases where such a defence was to be made, and that it would be understood as making a full defence if a full defence were necessary. That the

(a) But *Lutwyche* himself doubted the authority of this case, and referred to a variety of precedents, and to the case of *Clapham v. Lenthall*, *Hard.* 365., as an express authority to shew that it is not a full defence.

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second objection was not founded in fact; it being pleaded as an "ancient custom in the High Court of Chancery of our lord the now King and his progenitors *time out of mind* obtained and hitherto allowed and approved of;" and that such a custom might well extend to new created offices; that when an immemorial privilege is claimed for *all* the officers of the court, and new officers are made within the time of legal memory they must also fall within the privilege. That in a late case, *R. v. Warner, ante*, where a privilege was claimed by Custom House officers to be exempted from serving offices, it was holden that their privilege exempted them from the office of overseer of the poor, though it was there objected that that was an office created by statute within the time of legal memory. Thirdly, that the custom here claimed had been frequently claimed before and allowed by the different courts of law. Fourthly, that the effect of the ancient privilege here claimed was that the officers of that court should not be pleaded in any other Court than in Chancery. And that the reason given for the last objection did not support it, because the defendant did by his plea give a better writ; and that the mode of proceeding in the Petty Bag Office was well understood and was in every day's practice.

Judgment for the defendant (a).

(b) Vid. *Goldsmith v. Baynard*, 2 *Wils.* 228.

Saturday,
June 28th.

The KING *against* J. RICHARDS and Five Others.

If the commissioners under an inclosure act set out a private road for the use of the inhabitants of nine parishes, directing the inhabitants of six of those parishes to keep it in repair, no indictment can be supported against the latter for not repairing it, it not concerning the public.

THIS was an indictment against the defendants for not repairing a road. The indictment stated that by virtue of an act of parliament, 31 *Geo.* 3., intitled "an act for draining and dividing a certain moor or tract of waste land called *King's-sedgmore* in the county of *Somerset*" it was enacted that certain commissioners therein named should before making any allotments of the said moor set out and appoint such private roads and drove-ways over the same as in the judgment of the said commissioners should be necessary and convenient; and that all private roads and ways so to be set out should be made and repaired at the expence of all or any of the persons interested in the said moor and in such manner as the said commissioners should direct; that certain commissioners under the act in execution of the powers thereby vested in them by their award set out and appointed a certain private road and drove-

way

way in over and upon the said moor to be a private road and drove-way to be called *Henley Drove-Way* (describing it;) that the said commissioners also awarded that the said drove-way should be for the benefit use and enjoyment of the several owners tenants and occupiers for the time being of all and singular the tenements in the several parishes or hamlets of *Highbam Lowham Aller Pitney Long Sutton Huiſh Episcopi Butleigh Aſhcott* and *Greinton* in the said county in respect whereof and of the rights of common severally appurtenant thereto the divisions and allotments of the said moor were thereby assigned and allotted unto the same parishes or hamlets respectively; that the said commissioners thereby ordered and directed that the said drove-way should for ever thereafter be repaired by the several owners tenants and occupiers for the time being of all and singular the tenements in the several parishes or hamlets of *Highbam Lowham Aller Pitney Long Sutton* and *Huiſh Episcopi* in respect whereof and of the rights of common severally appurtenant thereto the divisions and allotments of the moor were thereby assigned and allotted unto the same parishes or hamlets respectively in equal shares and proportions, when and so often as need should be &c; by reason whereof the said private road and drove-way became and was a private road and drove-way for the purposes above mentioned, and by virtue of the said act and of the said award liable for ever hereafter to be from time to time amended and kept in repair in the manner and by the means aforesaid; that on &c. the said way, called *Henley Drove-Way*, was ruinous and in decay for want of needful reparation thereof; that *J. Richards* late of *Highbam*, and the five other defendants, (describing them respectively as of the parishes of *Lowham, Aller, Pitney, Long Sutton*, and *Huiſh Episcopi*) being severally and respectively owners tenants and occupiers of certain tenements in the several parishes or hamlets of *Highbam Lowham Aller Pitney Long Sutton* and *Huiſh Episcopi*, in respect whereof and of the rights of common severally appurtenant thereto the divisions and allotments of the said moor were thereby assigned unto the same parishes or hamlets; and being persons interested in the said moor, and by virtue of the premises liable to keep in repair and amend the said drove-way, had not duly repaired and amended the same &c.

The defendants pleaded not guilty; and on the trial at the last assizes at *Bridgewater* before Mr. Justice *Grose* the jury found a special verdict, in substance, as follows: That the commissioners named in the said act by their award dated the 22d of *October*

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1795 set out and appointed the said private road and drove-way as described in the indictment, but it was set out for the accommodation of the particular allotments; that the commissioners directed that it should be for the benefit use and enjoyment of the several owners &c. of the tenements of the nine parishes or hamlets mentioned in the indictment &c; and that it should be repaired by the several owners &c of the tenements in the six parishes or hamlets mentioned in the indictment &c. That the said road on &c was ruinous and out of repair. That the six defendants are severally and respectively owners tenants and occupiers of certain tenements in the said several parishes or hamlets of *Highbam Lowham Aller Pitney Long Sutton* and *Huish Episcopi* in respect whereof and of the rights of common severally appurtenant thereto the divisions and allotments of the said moor were by the said award assigned and allotted unto the same parishes or hamlets respectively and persons interested in the said moor. That the defendants had not repaired the said drove-way. That there are 500 tenements in the said several parishes or hamlets of *Highbam Lowham Aller Pitney Long Sutton Huish Episcopi Butleigh Ashcott* and *Greinton* of which the owners tenants and occupiers are entitled to the benefit use and enjoyment of the said drove-way under the said award; that there are 350 tenements in the said several parishes or hamlets of *Highbam Lowham Aller Pitney Long Sutton* and *Huish Episcopi* in respect whereof and of the rights of common severally appurtenant thereto certain divisions and allotments of the said moor were by the award assigned unto the said last mentioned parishes or hamlets; and that there are 250 owners tenants and occupiers of the said last mentioned tenements. That from the time of making the said award all persons willing to pass and repass over the said drove-way have at their free will and pleasure passed and repassed over the same on foot and with cattle and carriages at all times when the same has been passable. That the said drove-way communicates at *Peddle Gate* (a) with the King's highway called *Shapwick Road* and at *Henley Corner* with the King's Highway called *Somerton Road*, and that the road along the drove-way from *Peddle Gate* to *Henley Corner* is about two miles in length, but the distance from *Peddle Gate* to *Henley Corner* by any other way is about ten miles. But whether upon the whole matter so found the defendants be in law guilty &c; concluding in the usual form.

(a) *Peddle Gate* and *Henley Corner* are the two termini of the drove-way mentioned in the indictment.

When

When this case was called on in the paper for argument, *The Court* asked the prosecutor's counsel on what ground it could be contended that this was an indictable offence, the road in question being only a private road?

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Praed, for the prosecutor, answered that this though a private road was set out by virtue of a public act of parliament, under which the defendants were directed to repair it; that consequently the not repairing was a disobedience of a public statute, and therefore the subject of an indictment. That this might be considered to a certain degree as concerning the public; that even "a private act of parliament may be given in evidence without comparing it with the record, if it concern a whole county, as the act of *Bedford Levels*." 12 Mod. 216. And that there was no other remedy than the present, because it appeared by the special verdict that there were no less than 250 persons who were liable to the repair of this road, and that the difficulty of suing so many persons together was almost insuperable.

But the Court interposed, and said that, however convenient it might be that the defendants should be indicted, there was no legal ground on which this indictment could be supported. That the known rule was that those matters only that concerned the public were the subject of an indictment. That the road in question being described to be a *private road* did not concern the public, nor was of a public nature, but merely concerned the individuals who had a right to use it. That the question was not varied by the circumstance that many individuals were liable to repair, or that many others were entitled to the benefit of it; that each party injured might bring his action against those on whom the duty was thrown. That the circumstance of this road having been set out under a public act of parliament did not make the non-repair of it an indictable offence; that many public acts are passed which regulate private rights, but that it never was conceived that an indictment lay on that account for an infringement of such rights. That here the act was passed for a private purpose, that of dividing and allotting the estates of certain individuals. That even if it were true that there was no remedy by action the consequence would not follow that an indictment could be supported; but that in truth the parties injured had another legal remedy.

Judgment for the defendants.

Newbolt was to have argued for the defendants.

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An affidavit
may be
taken be-
fore the
clerk of the
attorney in
the cause, if
the clerk be
empowered
to take affi-
davits at all.

GOODTITLE on the Demise of PYE *against* BADTITLE.

THIS was a rule, calling on the lessor of the Plaintiff to shew cause why the affidavit of service of the declaration in this ejectment, and the rule thereon, should not be discharged, on an affidavit, which stated that *Commings* the commissioner before whom the affidavit of the service of the declaration was sworn, was employed as a clerk or writer in the office of Messrs. *Wallis* and *Penrose* the plaintiff's attornies.

Burrough, who shewed cause against the rule, produced an affidavit setting forth that *Commings* is an attorney of this court; that he is employed by *Wallis* (who is clerk to the commissioners for the sale of the land-tax) for which he receives an annual salary; that he is neither in partnership with *Wallis* and *Penrose*, nor derives any benefit whatever from the business carried on by them as attornies; and that he has no interest whatever in this cause either as attorney or otherwise. And he then contended that *Commings* did not come within the rule of the Court, that prohibits the attornies who are concerned in the cause, taking affidavits in the course of the cause.

Marryatt in support of the rule. It is observable that the rule of this Court *E. 15. Geo. 2.* is not a prohibitory rule. It does not prohibit attornies taking affidavits in certain cases, but, after reciting that by the general practice of the Court no affidavit in any case can be taken before the attorney in the cause, it enables the attorney to take an affidavit in one instance only, namely, an affidavit of the cause of action before process is sued out. This shews that the Court has at all times considered the practice of the attornies in the cause interfering with the affidavits in the cause as irregular and likely to produce mischievous consequences. And the reason on which that practice has been founded equally applies to the clerk of the attorney in the cause. The rules (a) of Court that prohibit attornies becoming bail only mention the attornies: but it has been holden that they also extend to their clerks (b), because they are equally within the mischief intended to be guarded against by the rules.

But *the Court* were of opinion that the rule of the Court, prohibiting the attorney who is concerned in the particular cause

(a) *M. 1654*; and *M. 1740*.(b) *Bologne v. Vautrin*, *Corwp.* 828.

taking affidavits in that cause, does not extend to the clerk of the attorney; and they

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Discharged the rule.

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MARTIN v. JUSTICE.

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A WRIT of error having been brought in this cause returnable in parliament, the same bail who had undertaken for the defendant in this Court were now offered as bail on the writ of error.

The same persons who were bail in this Court may justify again as bail upon a writ of error returnable in parliament.

Vaillant objected to their competency to become bail, on the authority of what is stated in *Tidd's Practice*.

Le Blanc J. (a) said he did not see what reason there could be for any distinction in this respect between one court of error and another; and referring to the case of *Colebrooke v. Diggs* in 1 *Str.* 527. from whence what was said in the book of practice referred to was taken, he observed that it did not warrant the position to the extent stated; for in the case in *Strange* it was only said that after error brought in the *Exchequer* Chamber, and bail put in, and afterwards error brought returnable in parliament, the Court upon consideration held that there must be *fresh* bail. But that only meant that bail must justify again upon the new writ of error (b).

Whereupon the bail, after examination as to their sufficiency, were admitted.

(a) The other Judges were not yet come into Court.

(b) So in the case of *Tilly v. Richardson*, *Salk.* 97. and 2 *Ld. Raym.* 840. it was said that upon a writ of error returnable in parliament *new* bail must be put in. But it is

evident from the whole context that by *new* bail it was only meant that bail must justify again upon the second writ of error, the former bail in error not being considered as undertaking on the second writ of error.

The KING against GABRIEL POWELL.

Saturday,
June 28th.

THIS was an information in nature of quo warranto against the defendant, calling upon him to shew by what authority he claimed to be and exercised the office of one of the burgeses of the borough of *Carmarthen*. The defendant by his plea stated

A charter ordained that no person should be admitted a burges, except he had for three

years before been seised and possessed of an estate of freehold for the term of his life or some greater estate in land of a certain value, with an exception of such as should be seised of *such* estate of such yearly value which had come to him by descent or marriage;—held that one who by virtue of his marriage became seised of an estate in right of his wife *for her life* was not within the exception, and therefore not qualified.

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The KING
against
POWELL.

that the borough of *Carmarthen* is an ancient borough, and that the mayor burgeses and commonalty of the said borough were incorporated by that name; that within the borough there is an indefinite number of burgeses, and that the office of a burges is a public office of great trust and pre-eminence touching the rule and government of the borough and the administration of public justice within the same; that the now King by his letters patent under the great seal dated at *Westminster* on the 27th of *July* in the 4th year of his reign, after reciting therein (amongst other things) that the corporation of *Carmarthen* were dissolved or at least incapable of exercising and enjoying their liberties or franchises, did will grant ordain confirm and declare that the said borough of *Carmarthen* should for ever thereafter be a body corporate &c. by the name of the mayor burgeses and commonalty of the borough of *Carmarthen*; and the King did thereby ordain that no person or persons should at any time thereafter be entitled to be admitted a burges or burgeses of the said borough, except all and every such person or persons who for three years or more before his or their application to be admitted a burges or burgeses had been seised and possessed by themselves or their tenants of an *estate of freehold for the term of his or their life or lives or some greater estate or estates of and in messuages lands* or tithes of land situate within the county of the said borough of the yearly value of 4 *l.*; and except all and every such person and persons who at the time of such application to be admitted a burges or burgeses of the borough should be seised and possessed by themselves or their tenants of messuages lands or tithes of land within the county of the same borough of such *estate* of such yearly value as aforesaid which had come to him by descent or marriage; and also except certain other persons in the said letters patent mentioned; all which said persons respectively so qualified should be entitled to be admitted burgeses, so as they made application for that purpose to the mayor and commonalty of the said borough on *Monday* next after *Michaelmas* in each year and at no other time, and so as they should then and there before the said mayor and commonalty make due and legal proof of such their respective qualifications as aforesaid. That the King did thereby ordain that upon such proof being so made every such person should thereupon be admitted and sworn a burges &c. at the next or any subsequent fortnight court to be holden in and for the said borough after such day on which he should so make his claim as aforesaid; as by the said letters patent &c. The defendant

feindant then pleaded that before and at the time of his application to be admitted a burges as hereinafter mentioned he was seized in right of *Mary* his then wife for the term of her natural life, and possessed by a certain then tenant of his the defendant's and his said then wife of one undivided moiety of and in certain lands and premises with the appurtenances situate within the county of the said borough, and which said undivided moiety was then of the yearly value of 4*l.* and upwards, and came to him the defendant by marriage with the said *Mary* his said wife, to wit, at &c.; that being so seized &c. and being desirous of being admitted a burges of the said borough, he the defendant heretofore to wit on *Monday* the 6th of *October* in the 28th year of the reign, &c. being *Monday* next after *Michaelmas* in that year, at the county borough of *Cardiff* afore said, did make application for that purpose to the then mayor and commonalty of the said borough, and did then and there before the said mayor and commonalty make due and legal proof of such his qualification as afore said, and was thereupon afterwards to wit, at his Majesty's fortnight court holden in and for the said borough on *Monday* the 25th of *April* in the 36th year of the reign &c. being a subsequent fortnight court holden in and for the said borough after such day on which he the defendant so made his said claim as afore said duly admitted and sworn a burges of the said borough, to wit at &c; and by means of the premises he the defendant on &c. was and still is one of the burgeses of the said borough &c. To this plea there was a general demurrer and joinder.

Miles in support of the plea was required to begin. He contended that the estate of which the defendant was seized in right of his wife for her life was *such an estate of freehold coming to him by marriage* as was sufficient to give him a qualification within the terms of the charter. The clause in the charter for regulating the qualifications for admission to burghership was evidently framed upon the *Durham* act 3 *Geo. 3. c. 15.*, which to prevent the making of occasional voters requires freemen to have been admitted twelve calendar months before they vote; with a proviso (*§. 2.*) that it shall not extend to any person entitled to his freedom by birth, marriage &c. The two clauses are distinct in the act of parliament; and in order to make sense of this charter the exception must be construed distinctly from the disqualifying clause. The charter first ordains that no person shall be admitted a burges, unless he has for three years or more been seized and possessed of an estate

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against
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of freehold *for the term of his life* or some greater estate. This was meant to apply solely to cases where the estate comes to the party by his own act. Then follows the exception where such estate comes to him by descent or marriage, that is, by operation of law. Now if the word *such* in the exception be taken to mean such estate of freehold *for the life of the party himself* &c. the exception will be rendered nugatory; for in no case by the mere *act of marriage* can the husband acquire an estate *for his own life*, or an estate of inheritance; therefore the term *such* estate can only be taken to have relation to the generic term "*Estate of freehold*," and to the *locality* of the estate, *i. e.* situate within the borough. And then the construction will be that in case of marriage &c. the party in order to qualify himself must have an estate of freehold or other greater estate coming to him by the marriage; but that in other cases where he has acquired property by his own act he must be seised of an estate of freehold for his own life at least during the period required. This construction will best accord with the letter and spirit of the *Durham* act from whence the provision was borrowed, the true object in both cases being to prevent the making of occasional voters to answer a particular purpose. But an estate acquired by marriage cannot come to a man by collusion.

Wood was to have argued in support of the demurrer. But *The Court* were of opinion that the estate on which the defendant relied in this case was not a qualification within the intent and meaning of the charter. That in order to make out the qualification it was necessary in all cases that the party should be seised of an estate for his own life at least, without considering how that estate may have been acquired. That the whole clause must be taken together; that the words "*such estate*" used in the exception must be taken to refer to what preceded it, namely, "*an estate of freehold for the term of his life or some greater estate &c.*" That by virtue of the marriage a party might become seised of an estate for his life, as if he married a woman seised of an estate in fee-simple and by whom he had issue; there he would be tenant for his own life by the curtesy; and in that case it would not be necessary within the terms of the exception that he should have been seised of the estate for three years preceding. And that this would satisfy the words of the exception in the charter.

1800.

HERON and Another *against* EDWARDS.Tuesday,
July 1st.

THIS was a rule calling on the plaintiffs to shew cause why the proceedings should not be set aside for irregularity. The defendant was arrested in the last Term, and the objection was that the declaration was delivered against him a prisoner in the custody of the Marshal in the last vacation.

A declaration may be delivered against a prisoner in the vacation.

Reader now shewed cause against the rule. This application is founded on the cases of *Hutchins v. Kenrick*, 2 Burr. 1048., and *Hollaway v. Crofs*, ib. 1052. there cited; where it was said generally that every declaration against a prisoner must be delivered in term time. But the reason for that determination was, "for prisoners are considered in the same light with attornies, (who are supposed to be always present in Court,) against whom bills cannot be filed but in term time;" and since that time it has been solemnly determined that a bill may be filed against an attorney in the vacation. *Comerford v. Price*, Doug. 313.; *Lane v. Wheat*, ib. n. (84); *Wagborne v. Fields*, Ante, 5 vol. 173; and *Dodsworth v. Bowen*, ib. 325. Therefore the foundation of those decisions fails; and the reason why a bill may be filed against an attorney in the vacation equally applies to the case of a prisoner. And instead of its being a hardship, it is an advantage to the prisoner, since it accelerates the proceedings. In many cases it may be necessary that a declaration should be delivered against a prisoner in vacation time to prevent the action being barred by the statute of limitations.

Wigley in support of the rule. In questions relating to the practice of the Court it is important that that which has been once determined after consideration should regulate the future practice. This very point was settled after a great deal of deliberation, and on the authority of a prior decision, in the case of *Hutchins v. Kenrick*; and no good reason has been given why those determinations should now be overruled, especially as the general practice since that time has been conformable to those cases. It is true that the rule respecting attornies has been since changed in the cases alluded to: but it does not follow that therefore the rule is to be changed respecting prisoners; the same reason does not apply to both. If no bill could be filed against an attorney except in Term time, the action might be barred by the statute of limitations, and

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therefore it is necessary for the purposes of justice in many cases that a party should be permitted to file a bill against an attorney in the vacation ; and so in the case of a new action against a prisoner : but this very distinction was taken in the case of *Hutchins v. Kenrick*, where it was holden that in the instance of a *new action* a bill may be filed in the vacation as of the preceding Term. But here the declaration was filed by the same plaintiff who had arrested the defendant.

Lord KENYON Ch. J. The rules of the Court are best contrived when they are made subservient to the justice of the case. The great object in framing rules is that justice may be obtained with as little expence and as much facility as may be ; and a practice that thwarts rules so framed ought to be discountenanced. The mode of charging a defendant with a declaration in vacation, by previously issuing a habeas corpus ad respondendum tested the last day of the preceding Term and returnable the first day of the next, mentioned in *Hutchins v. Kenrick*, and which formerly obtained, has been given up. And the foundation of that decision, as expressed by Mr. J. *Dennison*, was that prisoners in the custody of the Marshal are to be considered in the same situation as attornies, and that the same rule ought to govern both cases. Then let us try this case by that test. The practice respecting attornies has been since altered ; we were (I might say imperiously) called upon to reform that, for it was highly unjust that a plaintiff could not proceed against an attorney in the vacation, when if he did not his demand might be barred by the statute of limitations. The injustice of the ancient practice in this respect struck us so forcibly that we decided that a bill may be filed against an attorney in the vacation with a memorandum of the day when it was filed. Then why should not the same rule prevail respecting prisoners ? In the case referred to Mr. J. *Dennison* considered them as standing in *pari ratione*. And I think, as this will advance the justice of the case, we are well warranted by the decisions relating to attornies to say that this declaration was well delivered, and that the present rule must be discharged.

Per Curiam,

Rule discharged.

1800.

DOE on the Demise of TILYARD *against* COOPER.Wednesday,
July 2d.

HULTON on a former day in this Term obtained a rule, calling on the lessor of the plaintiff to shew cause why *William Howse* and *George Hirst* should not be made defendants in the stead of the defendant *Cooper*, on the ground that they were the mortgagees of the estate in question under *Cooper* for 16,000*l.*

The Court permitted a mortgagee to be made defendant in an ejectment with the mortgagor.

Wilson, who now shewed cause against the rule, observed that the rule was not drawn in the usual manner; this application not being to make these two persons defendants *with*, but *instead of*, the present defendant *Cooper*. And he said that it was of importance to the plaintiff that *Cooper* should continue to be a defendant, in order that his acts and declarations might be given in evidence on the trial. But

The Court said that the rule might be altered in that respect; and accordingly the rule was made absolute for letting *Howse* and *Hirst* defend with *Cooper*.

Rule absolute (a).

(a) Vide *Barnes*, 194. where it is said that the Court refused to permit the mortgagee to defend as landlord. See also *Jones d. Woodward v. Williams*, Tr. 15 Geo. 2.

2 *Crom. Praet.* 173 — But see 3 *Burr.* 1299. where it is said, arguendo, that a mortgagee may be admitted.

DOE on the Demise of FELDON *against* ROE.Wednesday,
July 2d.

TOPPING on a former day obtained a rule, calling on the plaintiff to shew cause why the proceedings should not be stayed till the costs of a former ejectment brought by the lessor of the plaintiff's father against the father of the real defendant in this case upon the same title were paid.

Proceedings in ejectment stayed till the costs of a former ejectment brought by the father of the lessor of the plaintiff against the defendant's father on the same title were paid.

This was moved on an affidavit, stating that about the year 1772 *J. Feldon* the father of the present lessor of the plaintiff brought an ejectment against the defendant's father to recover the same premises, in which the latter obtained a verdict, but the costs were never paid. That the present defendant derives title through his father from one *R. Bloxridge* the father's brother, who held the premises as devisee of *Cath. Winter*, and *J. Feldon* claimed on account of a supposed incapacity of the said *C. Winter* to make a will. That the defendant believes that the present lessor of the

plaintiff

1800.

DOE dem.
FELDON
against
KOE.

plaintiff claims under the very same title which was set up by his father.

And he cited the two following MSS. cases, the latter of which is also shortly reported in *Hullock* on Costs 452. "*Fairclaim v. Thrustout*, Easter 24 Geo. 3. B. R. Cowper obtained a rule to shew cause why proceedings in this ejectment should not be stayed till the costs of a former ejectment were paid. *Dayrell* shewed for cause, that this appeared to be a different title, the former ejectment having been on the demise of one person and this on the demise of the same person and two others jointly. And he cited *Moore on the demise of Newman v. James*, Trin. 33 & 34 Geo. 2. where a rule of this sort was discharged, it appearing not to be on the same demise. The Court said it was not sufficient that the demise was different, the title must be different. Here it might or might not be so; for the new lessors might be trustees. The Court then gave Mr. *Dayrell* time to get an affidavit that the title was different."—"Doe ex dem. *Lawson and Others* against *Law*, Widow, Hil. 25 Geo. 3. B. R. *Law* shewed cause against a rule to stay proceedings in this ejectment till the costs of a former ejectment were paid. He produced an affidavit to shew that this ejectment was brought by different persons, though claiming as heirs to the same estate which had been the subject of the former ejectment, but not claiming strictly by the same title. He contended therefore that they were not liable for the costs of the former ejectment. The former ejectment was brought long ago, and it would be giving this personal remedy for costs a greater effect than a judgment. In *Comb.* 106 & 110. *Ld. Ch. J. Holt* and the Court said it must be an ejectment brought by the same persons. He offered however to give security for payment of the costs if the plaintiffs did not recover. He cited also *Str.* 1152. Lord *Mansfield* said that the Court had arrived by degrees at this practice. It was adopted to prevent the hardship of frequent ejectments on the same title; and was the more reasonable as in real actions all representatives of the party were concluded for ever from setting up the same title. *Lee* and *Topping* in support of the rule said it had been resolved lately in several cases that before a man can be let in to try a second ejectment on the same title he must pay the costs of the former. If changing the name would vary the question, nothing would be more easy than to evade the rule. They cited the case of *Fairclaim v. Thrustout* (supra MSS.) and observed that there was no affidavit here to shew that the title is different from that set up by *Charles Chadwick*. Lord

Mansfield Ch. J. It is admitted that the plaintiff derives his title through *Charles Chadwick*. I think it a very beneficial rule; and that the Court are bound to extend it as cases arise. They do not say that you shall not try the question again, but you must first pay the costs of the former ejectment. This is the same title. Rule absolute."

1800.
Doe dem.
FELDON
against
ROE.

Milles now shewed cause against the rule; and said that this was an attempt to carry the practice which had prevailed in these cases further than any case had gone, with the exception of that of *Doe v. Law* cited. That the lessor of the plaintiff ought not to be bound by the act of his father, from whom he had no assets by descent; and of whom he was not the executor. In the case of *Doe d. The Duchess of Hamilton v. Hatherley* (a) the Court granted a similar application against the Duchess, because she had been joined with her husband in the first ejectment, and had proceeded in the cause after his death. In *Tredway v. Harbeck* (b) the Court were divided on such an application, Lord Holt denying it because the second ejectment was brought by a different party from the first, and because they could not take notice that it was upon the same title; though it was agreed that the same lessor making a new lessee in the second action should not thereby avoid the payment of the costs of the first; and the same difference prevailed in a subsequent case of *Dence v. Doble* (c) for the same reason. It will be a very uncertain and inconvenient rule; as it's application must depend on ascertaining whether or not the lessor in the second ejectment proceeds on the same title as the lessor in the first.

Lord KENYON Ch. J. The case cited is directly in point to support the present application; and a cogent reason is there given, that ejectments were introduced in lieu of real actions, in which all the representatives of the party to the first suit would have been concluded for ever. Therefore we should not suffer this fictitious remedy which was introduced in lieu of the other to press unnecessarily hard upon the parties.

Per Curiam,

Rule absolute (d).

(a) 2 Str. 1152.

(b) Comb. 106.

(c) Ib. 110.

(d) Vide *Keene d. Angel v. Angel*, *Ante*, 6 vol. 740.

1800.

Wednesday,
July 2d.OSBORNE *against* NOAD.

The Court will not refer it to the Master (after judgment by default) to see what is due for principal and interest, on an affidavit stating that the action is brought to recover the amount of a promissory note, unless it appear on the declaration that such is the cause of action.

THE defendant having suffered judgment to go by default, the plaintiff obtained a rule, calling on the defendant to shew cause why it should not be referred to the Master to compute what was due for principal and interest on the two promissory notes on which the action was brought.

Gaselee now shewed cause against it. And he said that this application was not warranted by any of the decisions on the subject, because here it did not appear on the record that the action was brought on any promissory note; the counts in the declaration being for goods sold, work and labour, money paid, and money had and received &c.

Hovell, in support of the rule, said that it appeared by an affidavit which he produced that the action was brought to recover the amount of two promissory notes, and that the plaintiff might recover the amount of them on the money counts. But

The Court said that the rule for referring it to the Master to see what was due for principal and interest on promissory notes and bills of exchange should be confined to those cases where it appeared on the declaration that the action was brought on the notes or bills. Therefore they

Discharged the rule.

END OF TRINITY TERM.

I N D E X

TO THE

PRINCIPAL MATTERS.

A.

ABATEMENT,

See PLEADING, No. 15. 17. 21.

ACCORD AND SATISFACTION,

See PAYMENT, No. 1.

ACTION ON THE CASE,

See CONSIGNOR.

1. **O**NE tenant in common cannot maintain an action on the case in nature of waste against another tenant in common (in possession of the whole, having a demise of the moiety from the first,) for cutting down trees of a proper age and growth for being cut. *Martyn v. Knowllys*, H. 39 G. 3. Page 145
2. Aliter, if the trees be not fit to be cut. *ib.*
3. If *A.* so negligently steer his vessel that it runs foul of *B.*'s, an action on the case is the proper remedy. *Ogle v. Barnes*, E. 39 G. 3. 188
4. But if *A.* wilfully run his vessel against *B.*'s and damage ensue, *B.* may bring trespass. *ib.*
5. The owners of vessels on the navigation between *A.* and *C.* having given public notice that they would not be answerable for losses in any case, except the loss were occasioned by the want of care in the master, nor even in such case beyond 10% per cent., unless extra-freight were paid, the master of one of the ships took on board the plaintiff's goods to be carried from *A.* to *B.* (an intermediate place between *A.* and *C.*)

and delivered at *B.*; the vessel passed by *B.*, without delivering the plaintiff's goods, then, and sunk before her arrival at *C.* without any want of care in the master: held that the owner of the vessel was responsible to the plaintiff for the whole loss in an action on the contract. *Ellis v. Turner*, E. 40 G. 3. Page 531

ADJOURNMENT,

See JURISDICTION, No. 4.

AFFIDAVIT,

See PRACTICE, No. 32.

AFFIDAVIT to hold to Bail.

See PRACTICE, No. 9, 10.

1. An affidavit to hold to bail stated that the debt arose on a bill of exchange or order for &c. drawn by *A.* upon and accepted by the defendant, payable to the plaintiff; upon this affidavit alone the Court refused to order the bail bond to be delivered up. *Wilks v. Adcock*, M. 39 G. 3. 27
2. But, the instrument declared upon appearing not to be a bill of exchange, the Court on reading the affidavit and the declaration ordered the bail bond to be given upon the defendant's filing common bail *ib.*
3. In an affidavit to hold to bail, made by the plaintiff's agent, (the plaintiff himself being abroad,) it is sufficient to negative a tender of the debt in bank notes "as the agent believes." *Munro v. Spinks*, T. 39 G. 3. 284
4. It

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4. It is sufficient to state in an affidavit to hold to bail that the defendant is indebted to the plaintiff in such a sum "for money had and received on account of the plaintiff," without adding "received by the defendant." *Coppinger v. Beaton*, M. 40 G. 3. Page 338
5. A co-assignee of a debt arising out of bills of exchange in his own possession may sue in the name of the original creditor, and hold the defendant to bail on his own affidavit, swearing positively as to all the facts required which are within his own knowledge, and to the best of his knowledge and belief as to such as are within the knowledge of his principal and co-assignees. *Geefwell v. Lovell*, M. 40 G. 3. 418
6. In an affidavit to hold to bail made by the assignee of a bankrupt, it is necessary to negative a tender of the debt in bank notes to the bankrupt before his bankruptcy; saying that no such tender was made to the assignee is not sufficient. *Martin v. Ranoe*, H. 40 G. 3. 455
7. In an affidavit to hold to bail made by the plaintiff's clerk (the plaintiff himself residing in England) it is not sufficient to negative a tender of the debt in bank notes "to the knowledge and belief of the clerk." *Cass v. Levi*, E. 40 G. 3. 520

AGREEMENT,

See AWARD, No. 2, 3. OFFICE, No. 1, 2, 3, 4.

ALIEN ENEMY,

See INSURANCE, No. 14. PLEADING, No. 9. PRACTICE, No. 6, 7.

AMENDMENT,

See REMOVAL, Order of, No. 3.

The Court will not permit any amendment to be made in a penal action where the plaintiff has been guilty of any delay in carrying on the suit. *Rankin v. Marsh*, M. 39 G. 3. 31

AMERICAN TREATY.

1. Under the late treaty between this country and the United States of America it is not

necessary that the trade from America to our settlements in the East Indies should be direct: it may be carried on circuitously by the way of Europe. *Wilson v. Marryatt*, M. 39 G. 3. Page 31

2. A natural born subject of this country may also be a citizen of America for the purposes of commerce, and entitled to all the advantages of an American under this treaty: the circumstance of his coming over here for a temporary purpose does not deprive him of those advantages. *ib.*

ANCIENT DEMESNE,

See PLEADING, No. 15.

ANNUITY.

1. The Court set aside the annuity deeds, because one of the trusts (viz. that in case the grantor should leave the kingdom he should pay any extra expence of the grantee in insuring his life) was not stated in the memorial. *Cummins v. Isaac*, E. 39 G. 3. 183
2. The memorial should contain the whole res gestæ. *ib.* 184
3. The trusts in an annuity deed must be stated accurately in the memorial. *Taylor v. Johnson*, E. 39 G. 3. *ib.*
4. Therefore where, in the conveyance of a life interest in an estate to a trustee in trust for securing an annuity, it was first stipulated that the trustee should permit the grantor to receive the rents and profits till default made in payment of the annuity, and then in trust for the grantee, and in the memorial it was stated that the trust was for the grantee generally, it was holden that the deed was void. *ib.*
5. If the consideration for granting an annuity to be paid by a banker's check, it is necessary to state the particulars of that check in the memorial. *Poole v. Cabanes*, M. 40 G. 3. 328
6. If the grantee of an annuity pay it without objection during the life time of the person who negotiated the business for the grantee, the Court will set aside the annuity deeds on a repre-

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representation of facts that could only have been answered by such agent for the grantee.

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7. A grant of a rent charge by a rector or vicar out of his benefice is void by stat. 13 *El. c. 20. Mous v. Leak, M. 40 G. 3.*

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8. But if in such a deed of grant he also covenant personally to pay the said rent charge or annuity, and give a warrant of attorney to confess judgment, as a collateral security, the Court will not order the deeds to be delivered up to be cancelled. *ib.*

9. In the memorial of such a grant it is not necessary to state the grantor's covenant to pay the annuity. *ib.*

10. If it be agreed by the grantor and grantee of an annuity that the former shall pay the expences of the writings, and he immediately after receiving the consideration money pay the fair charges of the writings out of that money, no notice need be taken of it in the memorial, but it may be there stated that the whole consideration money was paid to the grantor. *ib.*

APPEAL,

See Costs, No. 6.

APPOINTMENT,

See Devise, No. 6.

APPRENTICE,

See Settlement by Apprenticeship.

ARBITRATION,

See Award.

ARREST,

See Bankrupt, No. 10. 12. Sheriff, No. 2. Warrant.

ASSIGNMENT OF DEBTS,

See Award, No. 5, 6, 7. Bond, No. 2.

ASSIGNING BREACHES,

See Pleading, No. 4, 5.

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ASSUMPSIT.

1. If *A.* recover in tort against two defendants, and levy the whole damages on one, that one cannot recover a moiety against the other in an action for money paid to his use. *Merryweather v. Nixan, E. 39 G. 3.*

Page 186

2. Alike, if *A.* recover in *assumpsit* against two. *ib.*

3. The goods of a stranger on the premises of another person were distrained by the landlord for rent in arrear, and the stranger was obliged to pay the rent to redeem them; held that the stranger might maintain *assumpsit* for money paid to the use of the original lessees who were bound by their covenants to their landlord, although some of them had to the knowledge of the plaintiff before he placed his goods on the premises assigned their interest to one of their co-lessees, who was in the exclusive possession at the time. *Exall v. Partridge, Tr. 39 G. 3.*

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4. But *A.* cannot, by the voluntary payment of *B.*'s debt, raise an *assumpsit* against *B.*

ib. 310

5. Under a limitation in a marriage settlement a Court of Law held that the wife took an estate tail: and though it was recited in the deed that the husband's father conveyed in consideration of the marriage, and "for settling and establishing the lands to the uses therein after expressed", and subsequent uses were added in the deed, yet the Court would only take notice of the legal estate: and the husband and wife having levied a fine, and having agreed to sell the estate to a purchaser, from whom they had received part of the purchase-money, the Court would not permit the purchaser to recover back the deposit money in an action for money had and received. *Alpats v. Watkins, E. 40 G. 3.*

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6. The plaintiff having submitted to arbitration certain matters between his principals (from whom he had a power of attorney assigning their right in the subject matter to him and empowering him to submit the same to arbitration) and the defendants, and a sum being awarded to him as such attorney; held that he might maintain *assumpsit* upon the award in his own name. *Banfill v. Leigh, E. 40 G. 3.*

571

8 E

7. And

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7. And it is not necessary in such action for the plaintiff in setting forth the assignment to him from his principals to make a pro-
fert of the same in his declaration. *Page* 571

8. Where money deposited upon an illegal
wager has been paid over to the winner by
the consent of the loser, the latter cannot
afterwards maintain an action against the
former to recover back his deposit. *Hawson*
v. Hancock, E. 40 G. 3. 575

9. The assignee of a Scotch bond may main-
tain an action of assumpsit here against the
obligor in his own name. *Innes v. Dunlop,*
T. 40 G. 3. 595

10. A broker who contracts with others for the
sale of stock at a future day by the autho-
rity of his principal, who afterwards refuses
to make good the bargain, cannot by pay-
ing the difference to such third persons
maintain an action on an implied assumpsit
against his principal for the amount; though
the broker did not disclose the name of his
principal at the time of the bargain made.
Child v. Morley, T. 40 G. 3. 610

11. But such purchasers may maintain an
action for the difference against the prin-
cipal, notwithstanding the statute, 7 G. 2.
c. 8. s. 7. *ib.*

ATTACHMENT,

See AWARD, No. 1.

1. A rule nisi for an attachment for non-pay-
ment of money, pursuant to the Master's
Allocatur, cannot be served on a Sunday.
M'Ilham v. Smith, M. 39 G. 3. 86

2. A subpoena may be issued from the Crown
Office requiring a witness to attend at the
assizes in the country to give evidence in
support of an intended prosecution for a
felony; and B. R. will grant an attach-
ment against him for not attending accord-
ingly. *R. v. Ring, E. 40 G. 3.* 585

ATTORNEY,

See PRACTICE, No. 25.

1. When both parties are attorneys of the
same Court, the plaintiff cannot hold the
defendant to bail. *Nichols v. Earle, M. 40*
G. 3. 395

2. If he do, the Court will discharge the de-
fendant out of custody, and order all the
proceedings to be stayed *without costs.* *ib.*

3. An attorney has no privilege against foreign
attachment. *Ridge v. Hardcastle, M. 40*
G. 3. *Page* 417

ATTORNEY, Power of,

See AWARD, No. 5, 6, 7.

AVERAGE,

See CHARTER-PARTY, No. 1.

AWARD.

1. An agreement to enlarge the time for mak-
ing an award must contain a consent that
it shall be made a rule of Court, otherwise
no attachment will be granted for not per-
forming an award made under it. *Jenkins v.*
Law, M. 39 G. 3. 87

2. To covenant in a deed (made for the per-
formance of several matters) the defendant
cannot plead that in the deed there is a co-
venant that in case any difference should
arise between the parties respecting any part
of the agreement it should be settled by three
arbitrators to be chosen &c. and that he
offered to refer the matter in dispute &c.
but that the Plaintiff refused, &c. *Thomp-*
son v. Charnock, H. 39 G. 3. 139

3. Such an agreement to refer &c. does not
oust the Courts of Law or Equity of their
jurisdiction. *ib.*

4. The Court will not make a submission to
an award a rule of Court, where part of the
matter agreed to be referred has been made
the subject of an indictment; the statute 9
& 10. W. 3. c. 15 for regulating "con-
troversion suits or quarrels" by arbitra-
tion being confined to civil disputes. *Wat-*
son v. M'Culum, E. 40 G. 3. 520

5. A. and B. in 1797 assigned to the plaintiff
all debts due to them, and gave him a power
of Attorney to receive and compound for the
same; under which the plaintiff in 1799 sub-
mitted to arbitration the matters in difference
then subsisting between his principals and
the defendants; and the plaintiff and de-
fendants promised to each other to perform
the award. The arbitrators having award-
ed a sum to be paid to the plaintiff, as such
attorney, he may maintain an action for it
in his own name. *Banfil v. Leigh, E. 40*
G. 3. 571

6. The Court will not presume that the mat-
ters in difference submitted to arbitration
arose

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anole subsequent to the indenture of assignment and power of attorney from the principals to the plaintiff; but such matter may be pleaded by way of defence to the action.

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7. It is not necessary for the plaintiff in setting forth the assignment to him from his principals (by virtue of which he was authorized to submit their demands to arbitration) to make a profert of the same in his declaration. *ib.*

BAIL,

See AFFIDAVIT to hold to bail. COSTS, No. 3. PRACTICE, No. 2, 3, 4, 12, 19.

1. Bail to the Sheriff are liable for the Plaintiff's whole debt (without regard to the sum sworn to) and costs, provided they do not exceed the penalty of the bail bond. *Stevenson v. Cameron, M. 39 G. 3.* 28

2. But bail to the action are not liable beyond the sum sworn to and the costs. *ib.*

3. Bail in the original action, after judgment recovered against them on the bail bond, may be holden to bail in an action on such judgment. *Prendergast v. Davis, M. 39 G. 3.* 85

4. But bail to the Sheriff cannot themselves be holden to bail in an action on the bail bond. *ib.*

5. An action on the bail bond must be brought in the Court where the original action was brought. *Dunty v. Barclay, H. 39 G. 3.* 152

6. Bail have eight days to render the principal from the return of that writ on which there is an effectual proceeding against them. *Wilkinson v. Vass, H. 40 G. 3.* 422

7. Therefore where the plaintiff sued the bail on their recognizance, who did not render the principal within eight days, and then the plaintiff died, and his executors brought another action against the bail, it was ruled that the bail had eight days from the return of the process in the second action in which to render the principal. *ib.*

8. A defendant who has given a bail bond cannot be holden to bail in an action brought by the Sheriff on that bond. *Mellish v. Peterick, H. 40 G. 3.* 450

9. Bail above may be put in before the return of the writ; and consequently the Plaintiff cannot afterwards proceed on the bail bond. *Hyde v. Whiskard, H. 40 G. 3.* Page 456

10. When the rule to bring in the body expires the last day of a Term, the bail have the whole of the first day of the next Term to justify; and if the defendant surrender in discharge of his bail on any part of that day the Sheriff cannot be attached for not bringing in the body. *R. v. The Sheriff of Middlesex, H. 40 G. 3.* 464

11. The plaintiff may sue out a writ against the bail, on their recognizance, on the return day of the ca. sa. against the principal. *Shivers v. Brooks, T. 40 G. 3.* 628

12. The same persons who were bail in B. R. may justify again as bail upon a writ of error returnable in parliament. *Martin v. Justice, T. 40 G. 3.* 639

BAIL BOND,

See PRACTICE, No. 1.

BANKRUPT,

See PLEADING, No. 8. PRACTICE, No. 23, 24. TRUST DEED, No. 1.

1. Goods, the property of a widow and children, were upon her second marriage assigned to trustees, in trust to suffer the husband to enjoy them, on condition that he should pay to the trustees for the use of the children 800*l.* by yearly instalments of 100*l.* each from July 1789; he continued in possession of them until July 1797, having paid only 250*l.*; the day before his bankruptcy the trustees re-possessed themselves of the goods: held that this was fraudulent as against creditors, and that the assignee of the bankrupt was entitled to the goods under the stat. 21 Jac. 1. c. 19. *Darby v. Smith, M. 39 G. 3.* 82

2. In this case the second husband had the possession of the goods not in autre droit, but in his own right, he having agreed to purchase, and partly paid for, them. *ib.*

3. A judgment creditor, who has taken his debtor in execution, cannot afterwards sue out a commission of bankrupt against him upon the same debt. *Cabin v. Cunningham, H. 39 G. 3.* 123

4. If

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4. If several partners by deed assign all their partnership effects &c. to trustees for the benefit of their creditors, and some of the separate creditors of one partner do not assent to it, the assignment is void. *Eckhardt v. Wilson, H. 39. G. 3. Page 140*
5. In order to constitute an act of bankruptcy by departing from the dwelling-house a creditor must be delayed. *Barnard v. Vaughan, H. 39 G. 3. 149*
6. It is not sufficient (for that purpose) that a Sheriff's officer, who comes to levy under a fi. fa. on the trader's effects, is refused admittance after the trader has left his house. *ib.*
7. A trader after a secret act of bankruptcy consigned goods to a factor, who agreed to advance money thereon, and accordingly accepted and paid bills drawn on him by the trader; a commission afterwards issued against the trader on such prior act of bankruptcy, after which the factor sold the goods and received the money: held that he was answerable to the assignees for the value of the goods. *Coptland v. Stein, E. 39 G. 3. 199*
8. A creditor cannot prove his demand under the debtor's bankruptcy, unless there be a legal debt at the time of the bankruptcy. *Staines v. Planck, M. 40 G. 3. 386*
9. And therefore if *A.* give a warrant of attorney to *B.* to confess a judgment, with a defeazance that judgment shall not be entered up until a subsequent day on a contingency, and *A.* becomes bankrupt before that day, though *B.* afterwards enter up judgment on the happening of the contingency, he cannot prove this debt under *A.*'s commission. *ib.*
10. Under the stat. 5 G. 2. c. 30. s. 5. If a bankrupt surrender within the forty-two days after notice &c. the commissioners may by their own authority afterwards enlarge the time for taking his examination, during which enlarged time the bankrupt is privileged from arrest. *Davis v. Trotter, H. 40 G. 3. 475*
11. Where a trader commits an act of bankruptcy by lying two months in prison under an arrest, though the act of bankruptcy when complete relates back to the arrest and first imprisonment, yet no commission can be sued out thereon till the expiration of the

two months. *Gordon v. Wilkin, E. 40 G. 3. Page 507*

12. A bankrupt attending, upon notice for that purpose, a meeting of the commissioners to declare a dividend of his estate, is protected from arrest at the suit of a creditor, during such attendance, although several years after his last examination. *Arding v. Flower, E. 40 G. 3. 534*
13. *B. R.* will not on a summary application order an exoneretur to be entered on the bail-piece on the ground that the debt was contracted while the defendant was resident in a foreign country, and before he became a bankrupt by the laws of that country, though he may have obtained his certificate there. *Pedder v. MacMaster, T. 40 G. 3. 609*
14. And the Court distinguished the above from the case of *Ballantine v. Golding, M. 24 G. 3.* where the plaintiff as well as the defendant resided in Ireland at the Time of the defendant's bankruptcy there. *ib.*

BARON AND FEME,

See COSTS, No. 1.

Some writs cannot be used or contract as a feme sole who is on a separate maintenance under a deed of separation, not.

BENEFICE, *ib. p. 545.*

See ANNUITY, No. 7, 8, 9.

BILL OF EXCHANGE,

See PAYMENT, No. 1.

BOND,

See PLEADING, No. 4, 5, 13.

1. A bond was conditioned that the obligor should indemnify the obligee from all sums the latter should pay or be liable to pay on the obligor's account; and before the execution of the bond a memorandum was thereon indorsed, that the obligee "bath given an undertaking not to sue upon the bond until after the obligor's death;" held that this memorandum was to be taken as part of the condition, and made the bond in effect payable only by the representatives of the obligor after his death. *Burgh v. Preston, H. 40 G. 3. 483*
2. The assignee of a Scotch bond may maintain an action of assumpsit here against the obligor

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obligor in his own name. *Jones v. Dunlop*, T. 40 G. 3. Page 595

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B. R. E. A. D.

See CONVICTION, No. 9.

BURGESS,

See FREEMEN.

BUTTONS,

See CONVICTION, No. 6, 7.

BYE LAW.

1. A bye-law, made by a company carrying on trade in partnership, to prevent any one of the members carrying on a separate trade on his own account, is good; *Semb. R. v. The Faversham Fishermen Company*, M. 40 G. 3. 352
2. A bye-law may be good in part and bad in part, where the two parts are entire and distinct from each other. *ib.* 356

C.

CARMARTHEN,

See FREEMEN.

CARRIER,

See CONSIGNOR. PAYMENT, No. 1.

The owners of vessels on the navigation between A. and C. having given public notice that they would not be answerable for losses in any case, except the loss were occasioned by the want of care in the master, nor even in such case beyond ten per cent. unless extra freight were paid; the master of one of the ships took on board the plaintiff's goods to be carried from A. to B. (an intermediate place between A. and C.) and delivered at B.; the vessel passed by B. without delivering the plaintiff's goods there, and sunk before her arrival at C. without any want of care in the master: held that the owner of the vessel was responsible to the plaintiff for the whole loss in an action on the contract. *Ellis v. Turner*, E. 40 G. 3. 531

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CASES DOUBTED OR DENIED

1. *Orby v. Hals*, v. Ld. R. 3, in *Brown v. Compton*, H. 40 G. 3. Page 424
2. *De Souza v. Ewer*, *Park. Insur.* 361, 4th edit. in *Helstrom v. Rhodes*, H. 40 G. 3. 444
3. *Jones v. William*, *Dough.* 214. in *Shum v. Farrington*, H. 37 G. 3. C. B. cited in *Bor-ton v. Webb*, H. 40 G. 3. 459-463
4. *Ringstead v. Lady Lansborough*. *Barwell v. Brooks*, and that class of cases respecting the ability of married women to contract, and their liability to be sued alone, in *Marshall v. Rutton*, E. 40 G. 3. 545
5. *Mayor of Lynn v. Denton*, 1 vol. 689. and that class of cases respecting the inspection of corporation deeds &c. by strangers against whom actions are brought for corporate dues by corporations, in *The Mayor &c. of Southampton v. Graves*, T. 40 G. 3. 590

CERTIFICATE, SETTLEMENT BY,

See REMOVAL.

CERTIORARI,

See CONVICTION, No. 11. RECOGNIZANCE.

If a statute, authorizing a summary conviction before a magistrate, give an appeal to the sessions who are directed to hear and finally determine the matter, this does not take away the certiorari even after such an appeal made and determined. *R. v. Jukes and others*, E. 40 G. 3. 542

CHANCERY, COURT OF,

See PRIVILEGE, No. 1, 2.

CHARTER-PARTY OF AFFREIGHTMENT.

If A. let his ship to B. for a voyage, engaging to keep it in repair during the whole time, for which he is to receive freight on the return of the ship, and for the safety of the ship it becomes necessary during the voyage to put into a port to refit; the expence of refitting must be borne entirely by A, and B is not liable to contribute to it in proportion to his interest in the cargo as for a general average. *Jackson v. Charnock*, E. 40 G. 3. 509

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CHOSE

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CHOSE IN ACTION,

See ASSUMPSIT, No. 9. AWARD, No. 5, 6, 7.

COMMITMENT,

See WARRANT.

COMMON.

1. A right of common without stint as annexed to an ancient messuage, without land, cannot exist in law. *Benson v. Chester, M.* 40 G. 3. Page 396
2. An ancient deed, conveying the wastes of a manor to feoffees, in trust to permit the tenants and inhabitants &c. to use and enjoy the same as they had formerly done or been accustomed to do, must be taken to mean such a right of common as may by law exist, namely, a right of common limited by levancy and couchancy. *ib.*

CONSIGNOR.

1. If the consignor of goods deliver them to a particular carrier by order of the consignee, and they be afterwards lost, the consignor cannot maintain an action against the carrier for the loss, though he paid for booking the goods. *Dawes v. Peck, M.* 40 G. 3. 330
2. The action can only be brought by the consignee. *ib.*

CONTRIBUTION,

See ASSUMPSIT, No. 1, 2.

CONVICTION,

See RECOGNIZANCE.

1. The magistrates ought to state in the conviction the whole of the evidence for and against the defendant. *R. v. Clarke, E.* 39 G. 3. 220
2. On a question of qualification of a defendant to kill game, the convicting magistrates may ground their opinion of his not being qualified on the fact of the defendant's having on a former day sworn under the income act that his estate was less than 100 l. per annum. *ib.*
3. In a conviction, if the defendant appear and plead and the evidence be given on the

same day, the court will intend that the evidence was given in the defendant's presence, even though it be stated that the appearance was at *A.*, and that the evidence was given at *B.* *R. v. J. Swallow, T.* 39 G. 3.

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4. A defendant may be convicted of several offences in the same conviction. *ib.*
5. A conviction on the excise laws against such an one *and company* cannot be supported. *R. v. Harrison and Co., E.* 40 G. 3. 508
6. The Stat. 36 G. 3. c. 60. s. 2. directs that no person shall expose to sale metal buttons marked with the word *gilt* (the same not being really gilt) *knowing* the same not to be gilt, under a certain penalty; a conviction charging that the defendants did the act *unlawfully and fraudulently, contrary to the form of the statute*, is bad, without an express charge that they did it knowingly. And that such a defect is not aided by a proviso in the statute that "no conviction for any offence in the act should be set aside for want of form, or through the mistake of any fact circumstance or other matter, provided the *material facts alleged were proved*; for this in effect requires all material facts to be *alleged*; and *knowledge* is a material fact to constitute such an offence. *R. v. Jukes and others, E.* 40 G. 3. 536
7. A summary conviction for any offence created by statute must negative every exception contained in the clause creating the offence; and a defect in omitting is not aided by such a proviso as that above mentioned, for it is a material fact that the defendants did not come within any exception in the enacting clause. *R. v. Jukes and others, E.* 40 G. 3. 542
8. If a statute, authorizing a summary conviction before a magistrate, give an appeal to the Sessions, who are directed to hear and *finally determine* the matter, this does not take away the certiorari even after such appeal made and determined. *R. v. Jukes and others, E.* 40 G. 3. 542
9. A party may be convicted on the Stat. 40 Geo. 3. for selling by wholesale bread before it has been baked 24 hours, even though the seller give directions to the person

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person to whom he sells not to sell it by retail until the expiration of the 24 hours.

R. v. Smith, T. 40 G. 3. Page 588

10. Where power of conviction is given by Stat. to a magistrate, he is the sole judge of the weight of the evidence given before him; and B. R. will not examine whether or not he has drawn a right conclusion from the evidence: but if no evidence appear on the conviction to support a material part of the information, B. R. will quash the conviction. *ib.*

11. The defendants appealed to the Sessions against a conviction on a penal statute; where the conviction was affirmed; afterwards the record was removed here by certiorari, where the conviction was quashed for a defect in the information; then the prosecutor moved either that the certiorari should be sent back to the magistrates in order that they might return the original information (which had not the defect), or that a mandamus might issue to compel the magistrates to proceed on the original information: but B. R. refused to make such a rule. *R. v. Fukes, T. 40 G. 3. 625*

CORPORATION,

See FREEMEN. INSPECTION OF BOOKS, &c. REMOVAL FROM OFFICE.

A charter ordained that no person should be admitted a burgess, except he had for three years before been seised and possessed of an estate of freehold for the term of *his* life or some greater estate in land of a certain value; with an exception of such as should be seised of *such* estate of such yearly value, which had come to him by descent or marriage: held that one who by virtue of his marriage became seised of an estate in right of his wife for *her* life was not within the exception, and therefore not qualified. *R. v. Powell, T. 40 G. 3. 639*

COSTS.

1. If a writ of error be quashed because brought by a feme-covert, the defendant in error is entitled to costs under the stat. 4 Ann. c. 16. s. 25. *McNamara v. Fisher, T. 39 G. 3. 302*

3. The plaintiff is entitled to costs up to the time of the defendant's paying money into Court, though the plaintiff afterwards give notice of trial which he neglects to countermand whereby the defendant is entitled to judgment as in case of a nonsuit. *Sedmour v. Bridge, M. 40 G. 3. Page 408*

3. If a defendant remove an indictment here by certiorari, giving the usual recognizance under the stat. 5 W. & M. c. 11. and be found guilty, and die before the day in bank, his bail are liable to pay the costs. *R. v. T. Finmore, M. 40 G. 3. 409*

4. Trespass quare cl. fr. one count; several pleas of justification, on which issues taken; new assignment, as to which judgment by default; Venire as well to assess the damages on the judgment by default as to try the issues; all the issues found for the defendant: held that the defendant was entitled to the costs of those issues. *Griffiths v. Davis, H. 40 G. 3. 466*

5. The plaintiff is entitled to costs up to the time of the defendant's paying money into Court, though the plaintiff afterwards enter the record for trial and withdraw it. *Lorck v. Wright, H. 40 G. 3. 486*

6. If a person give notice of his intention to appeal to the Quarter Sessions against a poor-rate, but do not enter his appeal, the Sessions cannot award costs to the other party under the stat. 17 G. 2. c. 38. *R. v. The Justices of Essex, E. 40 G. 3. 583*

7. When upon setting aside a nonsuit the costs are directed to abide the event, though the plaintiff succeed on the second trial, he is not entitled to the costs of the first. *Austen v. Gibbs, T. 40 G. 3. 619*

8. Neither is the defendant entitled to the costs of the first trial in such case. *ib.*

9. But when the same party succeeds on both trials, he is entitled to the costs of both. *ib.*

10. Proceedings in ejectment were stayed till the costs of a former ejectment brought by the father of the lessor of the plaintiff against the defendant's father on the same title were paid. *Doe d. Feldon v. Roe, T. 40 G. 3. 645*

COVENANT,

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COVENANT,

See AWARD, No. 2. LANBLORD and TENANT, No. 2, 3, 4. PLEADING, No. 10, 11.

1. If the obligee of a bond covenant not to sue one of two joint and several obligors, and if he do that the deed of covenant may be pleaded in bar, he may still sue the other obligor. *Dean v. Newhall, H. 39 G. 3. Page 168*
2. Even if the obligee sue the first obligor, the latter cannot plead that the former released him; though he may plead the covenant in bar, which as between those parties operates quā a release. *ib.*
3. The plaintiff covenanted to sell a house to the defendant and to convey it to him on or before the 1st of August 1797, and to deliver up the possession to him on the 24th of June 1796; and in consideration thereof the defendant covenanted to pay the plaintiff 120*l.* on or before the said 1st of August 1797: held that the covenant to convey and that for the payment of the money were dependant covenants; and that the plaintiff could not maintain an action for the 120*l.* without averring that he had conveyed or tendered a conveyance to the defendant. *Glazebrook v. Woodrow, M. 40 G. 3. 366*

COURT,

See BAIL, No. 5.

COURTS OF CONSCIENCE.

1. The Court of Conscience at *Newcastle-upon-Tyne* can only hold plea where both the plaintiff and the defendant reside within the jurisdiction. *Bisby v. Fearon, E. 39 G. 3. 235*
2. And therefore, if the plaintiff reside in *Middlesex*, he may sue in this Court for a debt under 40*s.* though the defendant reside and the cause of action arose at *Newcastle*. *ib.*

CREDITORS,

See TRUST DEED.

CUSTOM HOUSE OFFICER,

See OFFICER, No. 5.

D.

DEBTOR,

See LORD'S ACT.

DEED.

1. The assent of two magistrates to a parish indenture of apprenticeship, which is required to be had from both when present together, is sufficiently signified by one of them first signing it alone and being afterwards present when the other signs it. *R. v. The Inhabitants of Winwick, H. 40 G. 3. Page 454*
2. A bond was conditioned that the obligor should indemnify the obligee from all sums the latter should pay or be liable to pay on the obligor's account; and before the execution of the bond a memorandum was thereon indorsed that the obligee "hath given an undertaking not to sue upon the bond till after the obligor's death:" held that this memorandum was to be taken as part of the condition, and made the bond in effect payable only by the representatives of the obligor after his death. *Burgh v. Preston, H. 40 G. 3. 483*

DESCENT.

The rule of *possessio fratris* does not apply to estates tail, nor to inheritances in fee simple without an actual possession of the brother of the whole blood. *Doe d. Gregory v. Whichels, E. 39 G. 3. 211*

DEVISE,

See LIMITATION.

1. Under this devise "I give my house and furniture to A., whom I make executrix, she paying all my debts and legacies; I likewise leave to A. all the rest of my personal estate;" A. takes a fee in the real estate. *Doe d. Willey v. Holmes, M. 39 G. 3. 1*
2. Under a devise to A. for life without impeachment of waste, remainder to his eldest son, and the heirs of such eldest son, and in default of issue male of A. then to B &c., A. takes an estate for life, remainder to his eldest son in tail, remainder to himself in tail. *Doe d. Bean v. Halley, M. 39 G. 3. 5*
3. In the construction of a will, the Court will give effect to the deviser's general intention,

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tention, though they thereby defeat a particular devise inconsistent with such general intent. *Doe d. Bean v. Halley*, M. 39 G. 3.

Page 5

4. The devisor after these introductory words, "as touching such worldly and personal estate wherewith it has pleased God to bless me" gave an estate for life to his wife in his estates in *A.* and *B.*; and then devised to *J. W.* "All his lands, freehold, copyhold, and leasehold in *A.*:"—"Also he devised to *J. W.* all his estate, freehold and copyhold in *B.*;" held that *J. W.* only took an estate for life in remainder in the devisor's lands in *A.* *Doe d. Child v. Wright*, M. 39 G. 3.

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5. Devise "to and amongst the devisor's seven sisters (he having eight) for life, share and share alike, and after the decease of any of them her share to go to her first and other sons in tail, and in default of such sons to and amongst her daughters as tenants in common in tail; and in case any of his said seven sisters died without leaving any issue of her body begotten, or such issue died before twenty-one and without issue, then to and amongst the survivors of his said seven sisters and their issue, to descend in like manner as before mentioned; and in case all his said seven sisters should die without issue, or such issue should all die before twenty-one and without issue," then over; held that the words "in default of such sons" did not make the remainder to the daughters depend on the contingency of there being no son born, but that on the death of the sons of any of the sisters without issue the remainder to the daughters of such sister took effect. *Lady Dowager Dacre v. Doe Lessor of Lady Dacre; in Error*, H. 39 G. 3.

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6. *A.* having an estate of his own in the county of *B.* and another in *C.*, and having also the legal but no beneficial interest in an estate in *D.* with power of appointing it to either of his sons, by will devised "All his estates of what nature or kind soever in the county of *B.* and at — in the county of *C.*, or elsewhere in the kingdom of England, after payment of his debts &c." to a younger son: held that the trust estate that

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he had the power of appointing did not pass by this general devise. *Roe d. Reade v. Reade*, H. 39 G. 3.

Page 118

7. Under a devise to "*A.* and *B.* and their heirs for ever, provided that if both have issue then both their dividends to go to the issue of their own bodies; but if but one have issue, then the premises to go to that issue" &c., *A.* and *B.* took estates tail. *Doe d. Gregory v. Whicheio*, E. 39 G. 3.

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8. *J. S.* devised thus, "As to what real and personal estate it has pleased God to bless me with (all my debts &c. being first paid out of my personal, and if that is not sufficient out of my real, estate) I give and dispose of the same as follows; I devise all my messuages lands tenements and hereditaments in *S.* &c. to *A.*:" held that *A.* took only a life estate. *Doe v. Allen*, H. 40 G. 3.

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9. By a devise of "all my copyhold estates situate in *A.*, and which I became entitled to on the decease of my father," copyhold estates do not pass which the devisor's father had surrendered to him in his life time: though the father retained the possession of them to the time of his death, which happened prior to the will made by the son; there being other copyholds of the son answering the description in the will. *Doe v. Bell*, E. 40 G. 3.

579

10. Where an estate is devised to trustees in fee, in trust for *A.* without any limitation of the estate to the cestui que trust, the latter takes the beneficial interest in fee. *Challenger v. Sheppard*, T. 40 G. 3.

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DILAPIDATIONS,

See PAYING MONEY INTO COURT.

DIPLOMA,

See EVIDENCE, No. 5.

DUTCH PRIZE ACTS,

See INSURANCE, No. 1.

E.

EAST INDIA SHIP,

See OFFICE, No. 1.

8 G

EJECTMENT.

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EJECTMENT.

1. In an ejectment the party having the legal title must prevail. *Doe d. Da Costa v. Dixon, M. 39 G. 3.* Page 2
And *Roe d. Reade v. Reade, H. 39 G. 3.* 122
2. Nor is there any difference in this respect between the case of an ejectment brought by a trustee against his cestui que trust and an ejectment brought by any other person. *ib.*
3. A plaintiff, who claims under an elegit subsequent to a lease granted to the tenant in possession, cannot recover in ejectment, though he give the tenant notice that he does not mean to disturb his possession, only wishing to get into the receipt of the rents and profits of the estate. *ib.* 2
4. The Court permitted a mortgagee to be made defendant in an ejectment with the tenant in possession, under whom he claimed. *Doe d. Tilyard v. Cooper, T. 40 G. 3.* 645
5. Proceedings in ejectment were stayed till the costs of a former ejectment brought by the father of the lessor of the plaintiff against the defendant's father on the same title were paid. *Doe d. Feldon v. Roe, T. 40 G. 3.* 645

ELECTIONS,

See FREEMEN.

EMBARGO.

The defendants contracted to carry the plaintiff's goods from *Liverpool* to *Leghorn*; on the vessel's arrival at *Falmouth* in the course of her voyage an embargo was laid on her "until the further order of council;" held that such embargo only suspended, but did not dissolve, the contract between the parties; and that even after two years, when the embargo was taken off, the defendants were answerable in damages to the plaintiff for the nonperformance of their contract. *Hadley v. Clarke, T. 39 G. 3.* 259

ENEMY, TRADING WITH

See INSURANCE, No. 14.

ERROR,

See COSTS, No. 1.

ESTATE,

See CORPORATION, No. 1.

ESTATE TAIL,

See DEVISE. LIMITATION.

ESTOPPEL,

See LANDLORD AND TENANT, No. 4.

EVIDENCE,

See CONVICTION, No. 2. INSURANCE, No. 9, 10.

1. Parol evidence may be given of questions asked by the testator at the time of executing his will, whether the contents were the same as those of a former will, to which he was answered in the affirmative, in order to set aside the latter will on the ground of fraud. *Doe d. Small v. Allen, H. 39 G. 3.* Page 147
2. So evidence may be given to shew that one will was substituted for another. *ib.*
3. A count for slanderous words spoken affirmatively is not supported by proof that they were spoken by way of interrogatory. *Barnes v. Holloway, H. 39 G. 3.* 150
4. An allegation in a plea, that "*A. by his writing sold the aftermath of land to B.,*" is not proved by evidence that at an auction held for the purpose of selling the aftermath *B.* was the purchaser, that *B.* gave a promissory note for the sum, and that *B.*'s name was written (by *A.*'s agent) in the printed catalogue as the buyer. *Symonds v. Ball, H. 39 G. 3.* 151
5. The mere production in a court of a diploma of doctor of physic under seal of one of the Universities is not in itself evidence to shew that the party named in the diploma is entitled to that degree. *Moises v. Thornton, T. 39 G. 3.* 303
6. Parol evidence may be received to explain a written agreement. *R. v. The Inhabitants of Laindon, M. 40 G. 3.* 379
7. The defendant in trespass quare clausum fregit may give evidence of soil and freehold under the general issue. *Argent v. Durrant, M. 40 G. 3.* 403
8. The

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8. The order of two justices unappealed from, removing a feme covert from *A.* to *B.* tho' describing her as "*widow*," is conclusive as to the settlement of her husband as well as herself. *R. v. The Inhabitants of Rudgeley*, T. 40 G. 3. Page 620

EXECUTRIX DE SON TORT,
See TRUST DEED, No. 2.

EXEMPTION,
See TAXES, No. 1.

F.

FACTOR,
See BANKRUPT, No. 7.

FEME,
See COSTS, No. 1. HUSBAND AND WIFE.
REMOVAL, Order of, No. 1. 4.

FINE, JUDGMENT OF
B. R. will not *mitigate* a fine imposed on a defendant by an inferior court, the record whereof is removed thither by certiorari. *R. v. Loveden*, T. 40 G. 3. 615

FOREIGN ATTACHMENT,
See ATTORNEY, No. 3.

FOREIGN SENTENCE,
See INSURANCE, No. 9, 10, 12, 13, 18.

FORCIBLE ENTRY,
See INDICTMENT, No. 3.

FORFEITURE,
See LANDLORD AND TENANT, No. 2, 3.

FRAUD, STATUTE OF
See LANDLORD AND TENANT, No. 1.

FRAUDULENT CONVEYANCE,
See TRUST DEED, No. 1.

FREEMEN.
By Stat. 3 G. 3. c. 15. No person claiming to vote at an election of members of parliament as a *freeman* can vote, unless he has been admitted to his freedom 12 months: this extends to *burgesses*, who vote at such elections, as well as freemen. *Williams v. Evans*, E. 39 G. 3. 246

FREIGHT,
See CHARTER PARTY, No. 1.

G.

GAME.
An estate of the value of 150*l.* per annum holden by the defendant in his own right, under a lease for 99 years to trustees if the defendant and others should so long live, is a sufficient qualification to kill game under the Statute 22 & 23 Car. 2. c. 25. s. 3. *Earl Ferrers v. Henton*, E. 40 G. 3. Page 506

GRANT,
See WAY.

HIGH TREASON,
See PRISON.

H.

- HIGHWAY.
1. That branch of sect. 19. of the Stat. 13 G. 3. c. 78, which directs that "when any highway hath been diverted above 12 months &c. if a new way hath been made in lieu thereof &c, and the same hath been acquiesced in &c, every such new highway shall from henceforth be public" is retrospective only; and consequently does not extend to highways diverted since that act. *Waite v. Smith*, H. 39 G. 3. 133
 2. Another part of the same section provides for the diverting of highways for the future. *ib.*
 3. If commissioners under an inclosure act set out a *private road* for the use of the inhabitants of nine parishes, directing the inhabitants of six of those parishes to keep it in repair, no indictment can be supported against the latter for not repairing such road, the matter not concerning the public. *R. v. Richards and others*, T. 40 G. 3. 634

HOUSE OF CORRECTION,
See PRISON.

HOUSE

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HOUSE OF LORDS.

The House of Lords having voted the defendant guilty of a breach of privilege in publishing a libel upon a member of their house, and having sentenced him to pay a fine of 100*l.* and to be imprisoned six months, and until such fine was paid, this Court refused to discharge the defendant out of custody he being brought up by a habeas corpus. *R. v. B. Flower, T. 39 G. 3.*

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2. When the House of Lords adjudge that any matter is a breach of privilege, their adjudication on the party accused is a conviction, and no court can bail him. *ib.*

HUSBAND AND WIFE,

See COSTS, No. 1.

A feme covert cannot contract and be sued as a feme sole, even though she be living apart from her husband, and having a separate maintenance secured to her by deed. *Marshall v. Rutton, E. 40 G. 3.*

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I.

INDICTMENT.

1. When an indictment for a nuisance states the nuisance to be still in existence, there must be judgment to abate the nuisance. *R. v. Stead, H. 39 G. 3.*

142

2. Aliter, where it is not stated in the indictment to be an existing nuisance. *ib.*

3. An indictment at common law, charging the defendants with having unlawfully and with a strong hand entered the prosecutor's mill and expelled him from the possession, is good. *R. v. Wilson, M. 40 G. 3.*

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4. If commissioners under an inclosure act set out a private road for the use of the inhabitants of nine parishes, directing the inhabitants of six of those parishes to keep it in repair, no indictment can be supported against the latter for not repairing it, the matter not concerning the public. *R. v. Richards and others, T. 40 G. 3.*

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INFANT.

1. A plaintiff cannot convert an action founded on a contract into a tort, so as to charge an infant, defendant. *Jennings v. Rundall, T. 40 G. 3.*

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2. Therefore where the plaintiff declared that at the defendant's request he had delivered a mare to the defendant to be moderately ridden, and that the defendant maliciously intending &c. wrongfully and injuriously rode the mare so that she was damaged &c., it was holden that the defendant might plead his infancy in bar, the action being founded on a contract. *ib.*

3. An infant, a captain in the army, is liable to pay for a livery ordered for his servant as necessities proper for one in his condition of life; but he is not liable for cockades ordered for the soldiers of his company. *Hands v. Slaney, E. 40 G. 3.*

578

INFERIOR COURT,

See FINE, Judgment of. PLEADING, No. 6.

INFORMATION,

See LIBEL.

INSOLVENT DEBTORS' ACT.

1. By the stat. 34 G. 3. c. 69. an insolvent debtor is discharged as to debts growing due, as well as to those due, before the 12th February 1798, and those words apply to a debt on a promissory note or bill of exchange given before, but not payable until after, that day. *Ld. Kinnaird v. Barrow, M. 39 G. 3.*

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2. The stat. 37 G. 3. c. 112. authorised the Justices of the Peace "at the first or second General Quarter Session or General Session to be holden after the passing of the act or some adjournment thereof," to discharge insolvent debtors under certain circumstances. The Justices in S. at an adjourned Sessions, held just after the act passed, the adjournment being of a Session holden before the act passed, ordered the keeper of the Sheriff's prison to discharge an insolvent: held 1st, that the adjourned Session had no jurisdiction, 2dly, that the officer was not justified in obeying the order, 3dly, that the Sheriff was answerable in

damages

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damages to the plaintiff, at whose suit the insolvent was in custody, for the act of the gaoler in discharging the insolvent. *Brown v. Compton*, H. 40 G. 3. Page 424

INSPECTION OF BOOKS, &c.

Pending an action by a corporation for tolls, the Court will not grant leave to inspect the corporation muniments on the application of the defendant, a stranger to the corporation. *The Mayor &c. of Southampton v. Graves*, T. 40 G. 3. 590

INSURANCE.

1. Commissioners appointed by the Crown under the stat. 35 G. 3. c. 80. which enabled them "to take into their possession and care all Dutch ships and effects detained or brought into the ports of Great Britain, and to manage sell and dispose of the same to the best advantage according to the instructions they should receive from his Majesty and the Privy Council," may insure in their own names such ships and effects after seizure abroad and while they are in transitu to this country. *Crauford v. Hunter*, M. 39 G. 3. 13
2. A trustee or consignee may insure, &c. *ib.*
3. So may a prize agent. *ib.*
4. So may the captors of a ship seized as prize. *Boehm v. Bell*, H. 39 G. 3. 154
5. At common law a person might have insured, without having any interest in the subject insured. 13
6. And the stat. 19 G. 2. c. 37. which prohibits such an insurance, only applies to "ships belonging to his Majesty or any of his subjects." *ib.*
7. If there be any illegality in the commencement of an integral voyage, and an insurance be effected on the latter part of the voyage which taken by itself would be legal, still the assured cannot recover on the policy. *Wilson v. Maryatt*, M. 39 G. 3. 31
8. The captors of a ship, seized as prize, are not entitled to a return of premium, (paid for insurance,) although it be afterwards adjudged to be no prize, and restitution be awarded to the owners by the court of Admiralty. *Boehm v. Bell*, H. 39 G. 3. 154

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9. A sentence of a foreign court of Admiralty is only conclusive here, in an action on a policy of insurance, as to the express ground of the sentence, but not as to any of the premises (noticed in the consideration part of the sentence) that led to the adjudication. *Christie v. Secretan*, E. 39 G. 3. Page 192
10. A warranty, that the property was *Danish*, (*Denmark* being then a neutral power) in a policy of insurance on ship and goods was holden to be conclusively disproved by a sentence of a court of Admiralty condemning the ship and cargo, because the master and crew had broken their neutrality in the course of the voyage insured by forcibly rescuing the ship which had been seized and carried into port by a belligerent Power for the purpose of search. *Garrals v. Kensington*, E. 39 G. 3. 230
11. Any forfeiture of neutrality by the wilful act of the assured, or of the master &c. after the commencement of the voyage insured, is a breach of such warranty. *ib.*
12. A sentence of condemnation of a *British* ship (which had been captured by a *French* privateer and carried into *Bergen* in *Norway* by the *French* Consul at *Bergen*) is an illegal sentence: and if after such a sentence the owner re-purchase his ship at a public auction at *Bergen*, he cannot recover the money so paid from the under-writer. *Havelock v. Rockwood*, T. 39 G. 3. 268
13. A warranty of neutrality in a policy of insurance is not falsified by a sentence in a foreign court of Admiralty condemning a ship for navigating contrary to the ordinances of that belligerent State; to which the neutral country had not assented. *Poliard v. Bell*, H. 40 G. 3. 434
14. Trading with an enemy, without the King's licence is illegal. And therefore it is illegal for a subject in time of war, without the King's licence, to bring even in a neutral ship goods from an enemy's port, which were purchased by his agent, resident in the enemy's country, after the commencement of hostilities; although it may not appear that they were purchased of an enemy. *Potts v. Bell, in Error*, E. 40 G. 3. 548

8 H

15 If

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15. If a ship be insured "at and from A. to B," and there be any illegality in the traffic during her stay at A., the assured cannot recover on the policy for a loss happening between A. and B. *Bird v. Appleton, E. 40 G. 3.* Page 562
16. Goods may be insured though purchased with the proceeds of a former illegal cargo. 562
17. An insurance on a ship for a particular voyage is legal, though she may have done some act in a former voyage for which she was liable to seizure. *ib.*
18. A warranty of neutrality in a policy of assurance is not falsified by a sentence of a foreign court of Admiralty condemning a ship for navigating contrary to the ordinances of that belligerent State to which the neutral country had not assented. *ib.*

INVENTION,

See PATENT.

JUDGMENT,

See INDICTMENT, No. 1, 2. INSURANCE, No. 9, 12, 13, 18. PRACTICE, No. 18. SET OFF, No. 1.

- "If the plaintiff enter up judgment in debt on a *mutuatus*, on a warrant of attorney "to enter up judgment in debt on bond," the Court will set it aside as irregular. *Paris v. Wilkinson, H. 39 G. 3.* 153

JURISDICTION,

See BAIL, No. 5. COURTS OF CONSCIENCE, No. 1, 2. PLEADING, No. 6. REMOVAL, Order of, No. 2.

1. By the 10 & 11 W. 3. c. 8. the proprietors of navigation shares in the River Tone are created a corporation, having certain funds, and are directed to keep an account of their receipts and disbursements, which are every year to be examined stated corrected and allowed by the Bishop of Bath and W. and the Justices of the Peace for the county of Somerset at their first general quarter sessions after a certain day, at which time they are to direct a distribution of the surplus profits, if any: Under this act the Justices at sessions in one year have no authority to revise or

correct any errors in the accounts upon which a balance was struck and allowed in any preceding year. *R. v. The Conservators of the River Tone, T. 39 G. 3.* Page 286

2. If manifest injustice has been done by the allowance of the accounts in any former year, the only remedy is in Chancery. *ib.* 291
3. But even that Court will not correct every error in an account of long standing. 292
4. The Stat. 37 G. 3. c. 112. authorised the Justices of the Peace "at the first or second general quarter session or general session to be holden after the passing of the act, or some adjournment thereof," to discharge insolvent debtors under certain circumstances. The Justices in S. at an adjourned session held just after the act passed, the adjournment being of a session holden before the act passed, ordered the keeper of the Sheriff's prison to discharge an insolvent; held, 1st, that the adjourned session had no jurisdiction; 2dly, that the officer was not justified in obeying the order of session; 3dly, that the Sheriff was answerable in damages to the plaintiff, at whose suit the insolvent was in custody, for the act of the gaoler in discharging the insolvent. *Brown v. Compton, H. 40 G. 3.* 424
5. The Court of B. R. will not mitigate a fine imposed by an inferior Court, the record whereof is removed thereby certiorari. *R. v. Loveden, T. 40 G. 3.* 615

L.

LANDLORD AND TENANT,

See PARTY WALL. USE and OCCUPATION.

1. Though by the statute of frauds it is enacted that all leases by parol for more than three years shall have the effect of estates at will only, such a lease creates a tenancy from year to year. *Clayton v. Blakey, M. 39 G. 3.* 3
2. If a lessee, who has covenanted not "to let, set, assign, transfer, make over, barter, exchange, or otherwise part with the indenture &c.," with a proviso that the landlord may in such case re-enter, give a warrant of attorney to confess judgment, on which the lease is taken in execution and sold, it is not a forfeiture of the lease, unless the war-

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rant of attorney be given for the express purpose of having the lease taken in execution. *Doe d. Mitchinson v. Carter, M.* 39 G. 3. Page 57

3. But if the warrant of attorney be given expressly for that purpose, it is in fraud of the covenant, and a forfeiture of the lease.

Doe d. Mitchinson v. Carter, T. 39 G. 3. 300

4. To an action by a lessor for a breach of covenant on an indenture of lease in not repairing &c. the lessee cannot plead in bar that the lessor had only an equitable estate in the premises, for that is tantamount to a plea of nil habuit in tenementis. But semble the lessee is not estopped from shewing that the lessor was only seized in right of his wife for her life, and that she died before the covenant broken; because an interest passed by the lease. *Blake v. Foster, H.* 40 G. 3. 487

LEASE,

See LANDLORD and TENANT. PARTY WALL.

LEVANCY AND COUCHANCY,

See COMMON.

LIBEL.

1. The Court refused to grant a criminal information against a bookseller for printing a report of the House of Commons, though it reflected on the character of an individual.

Rev. J. Wright, T. 39 G. 3. 293

2. It is neither the subject of a criminal prosecution nor of an action to publish a true account of the proceedings in parliament or of the courts of justice. *ib.* 298

LIBERUM TENEMENTUM,

See EVIDENCE, No. 7.

LIEN,

See PRACTICE, No. 25.

LIMITATION.

1. Under a limitation in a marriage settlement to the husband for life, then to the wife for

life, then to the heirs of the body of the wife, and their heirs, the wife takes an estate tail. *Alpass v. Watkins, E.* 40 G. 3. Page 516

2. And though it was recited in the deed that the husband's father conveyed in consideration of the marriage, and "for settling and establishing the lands &c. to the uses thereafter expressed," and subsequent uses were added in the deed; *B. R.* would only take notice of the legal estate. *ib.*

LORD'S ACT.

1. When a debtor is in execution at the suit of several plaintiffs on a joint debt, one of them may give a note for the weekly payments of 3s. 6d. under the Lord's act, signed by him alone "for himself and partners." *Meux v. Humphry, M.* 39 G. 3. 25

2. But when several executors are plaintiffs, they must all sign such a note. *Lepine v. Bayley, T.* 39 G. 3. 325

M.

MANDAMUS,

See CONVICTION, No. 11. REMOVAL FROM OFFICE.

MANUFACTURE,

See PATENT.

MARRIAGE SETTLEMENT,

See LIMITATION, No. 1.

N.

NAVIGATION,

See JURISDICTION.

NEWCASTLE,

See COURTS OF CONSCIENCE, No. 1, 2.

NOT GUILTY,

See EVIDENCE, No. 7.

NOTICE,

See PRACTICE, No. 15, 16.

NUISANCE,

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NUISANCE,

See INDICTMENT, No. 1, 2.

O.

OBLIGOR,

See COVENANT, No. 1, 2.

OFFICE,

See PRIZE. PROMOTION. REMOVAL FROM OFFICE.

1. A sale (by the owner) of the command of a ship employed in the *East India Company's* service, without the knowledge of the Company is illegal; and the contract of sale cannot be the foundation of an action.

Blackford v. Preston, H. 39 G. 3. Page 89

2. The Stat. 5 & 6 Ed. 6. prohibits the sale of certain offices. 92

3. It is also illegal to sell many other public offices not within the Stat. 5 & 6 Ed. 6. *ib.* 94

4. But offices not within that Statute may be sold, provided the sale takes place with the consent of those who have the power of appointment. *ib.*

5. An officer of the customs is exempted from serving the office of overseer of the poor, though he has not his writ of privilege at the time. *R. v. Warner*, M. 40 G. 3. 375

OVERSEER,

See OFFICE, No. 5.

OYER.

The party demanding oyer has as many pleading days to plead after oyer is granted as he had when it was demanded. *Webber v. Austin*, M. 40 G. 3. 356

P.

PARLIAMENT,

See HOUSE OF LORDS. LIBEL.

PARTY WALL.

1. The lessor of a house at rack-rent (there being no other person entitled to any kind

of rent) is liable to contribute to the expences of a party-wall under Stat. 14 G. 3. c. 78., though the lessee has improved the house demised. *Beardmore v. Fox*, E. 39 G. 3. Page 214

2. The tenant of a house covenanted in his lease to pay a reasonable share and proportion of supporting repairing and amending all party walls &c. and to pay all taxes duties assessments and impositions parliamentary and parochial; "it being the intention of the parties that the landlord should receive the clear yearly rent of 60*l.* in net money, without any deduction whatever." During the lease the proprietor of the adjoining house built a party wall between that house and the house demised, under the Stat. 14 G. 3. c. 78. held that the tenant, (not the landlord) was bound to pay the moiety of the expence of the party-wall. *Barrett v. The Duke of Bedford*, T. 40 G. 3. 602

PATENT.

1. A patent was granted by the crown for fourteen years to A. for his "method of lessening the consumption of steam and fuel in fire engines;" the specification stated that the "method consisted of the following principles," (describing the mode in which those principles were applied to the purposes of the invention;) afterwards an act of parliament was passed to extend the patentee's term, the title of which was an act for vesting the sole property &c. "of certain steam engines called fire engines of his invention" &c." and, after reciting that the patent was "for making and vending certain engines by him invented for lessening the consumption of steam and fuel in fire engines" &c., it granted him the sole right of "making and selling the said engines:" held that the invention was the subject of a patent, and (the patentee having in his specification described his invention) that the right of the patentee under the patent and act of parliament was valid. *Hornblower v. Boulton*, in Error, H. 39 G. 3. 95

2. The proviso in the Stat. 21 Jac. 1. c. 3. s. 6., which enables the Crown to grant patents for "new manufactures," does not authorise the granting of a patent for mere principles, *semb.* *ib.*

3. A

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3. A patent may be granted for an addition to an old invention. *Page 95*

PAYING MONEY INTO COURT,

See COSTS, No. 2. 5.

The defendant cannot pay money into court, on the common-rule, in an action for delapidations. *Salt v. Salt, M. 39 G. 3.*

PAYMENT.

The plaintiff covenanted to carry a cargo of pilehards to *Ancona* on freight, and the defendant covenanted to pay or cause to be paid the freight there on delivery of the cargo. On plea of payment, held it was no payment that the defendant's agent at *A.* gave the plaintiff a bill on the defendant in *England*, instead of money, which bill the plaintiff received without objection: though the defendant's agent was indebted to the defendant at the time in more money than the amount of such bill, and ought to have paid the freight himself, (which fact however was not known to the plaintiff) and the defendant afterwards refused payment of the bill. *Tapley v. Martens, H. 40 G. 3.* 451

PILOT,

See THAMES.

PLEADING,

See ACTION ON THE CASE, No. 3. 4.

AWARD, No. 2. COVENANT, No. 1, 2, 3.

INDICTMENT, No. 3. INFANT, No. 2.

PRACTICE, No. 6, 7. 11.

1. Though the proprietor of tithes leave them on the land more than a reasonable time after they are set out, and after he has notice that they are set out, the owner of the land cannot justify in trespass turning in his cattle upon the land to depasture it in the usual course of husbandry, whereby the cattle consumed the tithes. *Williams v. Ladner, M. 39 G. 3.* 72
2. In such a case the owner's remedy is either by distress or action. *ib.*
3. To trespass for an assault and battery, the defendant may plead that the plaintiff with

force and arms and with a strong hand endeavoured forcibly to break and enter the defendant's close, whereupon the defendant resisted and opposed such entrance &c, and if any damage happened to the plaintiff it was in defence of the possession of the said close. *Weaver v. Bush, M. 39 G. 3. P. 78*

4. The plaintiff after obtaining judgment on demurrer, in debt on bond conditioned to pay an annuity, must assign breaches on the record under the Stat. 8 & 9 W. 3. c. 11. *f. 3. Walcot v. Goulding, H. 39 G. 3.* 126
5. After oyer of the condition and non est factum pleaded to debt on bond, on which issue is joined and notice of trial given, the plaintiff may enter a suggestion on the roll, and assign breaches pursuant to the Stat. 8 & 9 W. 3. c. 11. *Ethersey v. Jackson, E. 39 G. 3.* 255
6. In case for rescuing a debtor taken on mesne process sued out of the Palace Court, it was holden not to be a sufficient ground for arresting the judgment that it was not alleged that the cause of action in the inferior court arose within the jurisdiction, or that it was not alleged that the party below did not appear at the return of the writ. *Bentley v. Donnelly, H. 39 G. 3.* 127
7. In an action for consequential damage from slander imputing incontinence to the plaintiff, it is enough to state that he was employed to preach to a dissenting congregation at a certain licensed chapel situate at *A.*, that he derived considerable profit from his preaching, and that by reason of the scandal "persons frequenting the chapel had refused to permit him to preach there and had discontinued giving him the profits that they usually had and otherwise would have given," without saying who those persons were or by what authority they excluded him, or that he was preacher duly qualified according to the Stat. 10 An. c. 2. *Hartley v. Herring, H. 39 G. 3.* 130
8. To assumpsit by several partners, the defendant may plead the bankruptcy of one of them in bar. *Eckhardt v. Wilson, H. 39 G. 3.* 140
9. In a plea of alien enemy the defendant must state that the plaintiff was born in a

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- foreign country at enmity with this country, and that he came here without letters of safe conduct from the King. *Casseres v. Bell*, H. 39 G. 3. Page 166
10. In an action of covenant for quiet enjoyment, the plaintiff may state generally that *A. B.* lawfully claiming title under the defendant entered on the plaintiff by virtue of such title, without setting forth the particulars of *A. B.*'s title. *Hodgson v. The E. I. Company*, T. 39 G. 3. 278
11. "Non infregit conventionem" cannot be pleaded where the plaintiff assigns a breach (as above) adding, "and so the defendant did not keep his covenant." *ib.*
12. A plea of molliter manus imposuit, in order to turn the plaintiff out of the defendant's house where she continued against his will, is no answer to a charge against the defendant for striking the plaintiff repeated blows and with great force and violence knocking her down several times. *Gregory v. Hill*, T. 39 G. 3. 299
13. To debt on bond, conditioned that one *B. R.* should account for and pay over to the plaintiffs, as treasurers of a charity, such voluntary contributions as he should collect for the use of the charity, the defendants pleaded general performance: the plaintiff replied that *B. R.* had received divers sums, amounting to a large sum, viz. 100 l. from divers persons for divers voluntary contributions for the use of the said charity, which he had not accounted for or paid over &c.; held on special demurrer that the replication was sufficiently certain. *Barton v. Webb*, H. 40 G. 3. 459
14. A defendant in an information in nature of quo warranto may plead several pleas under the Stat. 32 G. 3. c. 58, though he do not plead (in one of them) the plea of limitation of time thereby given. *R. v. Autridge*, H. 40 G. 3. 467
15. Ancient demesne must be pleaded within the first four days of the term. *Denn v. Fenn*, H. 40 G. 3. 474
16. To an action by a lessor for a breach of covenant on an indenture of lease in not repairing &c, the lessee cannot plead in bar that the lessor had only an equitable estate in the premises; for that is tantamount to a plea of nil habuit in tenementis. But semble the lessee is not estopped from shewing that the lessor was only seised in right of his wife for her life, and that she died before the covenant broken; because an interest passed by the lease. *Blake v. Foster*, H. 40 G. 3. Page 487
17. The defendant in a plea in abatement of misnomer must give his surname as well as his true christian name, although his true surname be used in the declaration. *Haworth v. Spraggs*, E. 40 G. 3. 515
18. The plaintiff an agent having had the demands of his principals on the defendant assigned to him, and authority given him to submit the same to arbitration, does so accordingly in conjunction with the defendant; and a sum being awarded to be paid to him as such attorney, he may maintain an action for it in his own name against the defendant and need not, in setting forth the assignment to him from his principals, (by virtue of which he was authorised to submit their demands to arbitration) make a profert of the same in his declaration. *Banfill v. Leigh*, E. 40 G. 3. 571
19. In justifying (in a plea to an action of trespass) the use of a crane in a public wharf, it is sufficient to say that it is "a public open and lawful wharf," without claiming the right by immemorial usage; for the public have a right to the use of such quays and to the cranes erected thereon, paying the customary compensation. *Bolt v. Stennett*, T. 40 G. 3. 606
20. It is no answer to a plea of tender before the exhibiting of the plaintiff's bill, that the plaintiff had before such tender retained an attorney and instructed him to sue out a latitat against the defendant, and that the attorney had accordingly applied for such writ before the tender, which writ was afterwards sued out. *Briggs v. Calverley*, T. 40 G. 3. 629
21. A

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21. A plea in abatement to the jurisdiction of the court beginning "defendit vim et injuriam quando &c. is good. *Wilkes v. Williams*, T. 40 G. 3. Page 631

POLICY,

See INSURANCE.

POOR RATE,

See COSTS, No. 6.

1. The proprietors of tolls on a navigation are to be rated to the poor in the parish where the tolls become due. *R. v. The Staffordshire and Worcestershire Canal Company*, M. 40 G. 3. 340
2. Therefore where a navigation act empowered the proprietors to take a toll of so much per mile per ton for all goods carried along the canal; held that they were rateable to the poor for the tolls in the different parishes where the respective voyages finished; though for their convenience they were authorised to collect the tolls where they pleased, and did in fact collect them in other parishes. *ib.*

POSSESSIO FRATRIS,

See DESCENT, No. 1.

PRACTICE,

See AFFIDAVIT. AFFIDAVIT TO HOLD TO BAIL. ATTORNEY. BAIL. BANKRUPT, No. 13. COSTS, No. 2. EJECTMENT, No. 4, 5. INSPECTION OF BOOKS &c. JUDGMENT, No. 1. LORDS' ACT. OYER. SET-OFF, No. 1. SUBPOENA, No. 1.

1. If the fourth day for perfecting bail be the last day of the term, and the bail be not perfected before the rising of the Court on that day, an assignment of the bail bond to the plaintiff in the evening of that day is regular. *Dent v. Weston*, M. 39 G. 3. 4
2. Bail to the sheriff are liable for the plaintiff's whole debt (without regard to the sum sworn to) and costs, provided they do not exceed the penalty of the bail bond. *Stevenson v. Cameron*, M. 39 G. 3. 28

3. But bail to the action are not liable beyond the sum sworn to and the costs. Page 28

4. If the sheriff discharge the defendant without taking a bail bond, the Court will not permit the latter to file common bail on paying the sum sworn to, if the plaintiff have any claim on him beyond that sum. *ib.*

5. If the sheriff be once in contempt for not bringing in the body, that contempt is not purged by the defendant's surrendering on a subsequent day though before an attachment is moved for against the sheriff. *R. v. The Sheriff of Middlesex*, M. 39 G. 3. 29

6. Under a Judge's order to plead issuably, the defendant can only put in a plea that goes to the merits. *Simeon v. Thompson*, M. 39 G. 3. 71

7. The plea of alien enemy is not such a plea. *ib.*

8. Where the declaration filed in the office before the defendant's appearance was indorsed filed conditionally and judgment afterwards signed for want of a plea, the Court held it regular, though the notice served on the defendant was of a declaration generally. *Cort v. Jaques*, M. 39 G. 3. 77

9. After notice of executing a writ of enquiry on a judgment by default, it is too late for the defendant to object to the affidavit on which he was holden to bail, that it omitted to negative any tender of the debt in banknotes, as required by Stat. 37 G. 3. c. 45. *Desborough v. Copinger*, M. 39 G. 3. 77

10. Such an objection must be made within a reasonable time. *ib.*

11. The rule to plead to an amended declaration must be a four days' rule. *Barton v. Moore*, M. 39 G. 3. 87

12. If the principal be surrendered in time, but the bail omit to give regular notice of it to the plaintiff, in consequence of which he proceeds upon the bail bond, the bail may apply to set aside the proceedings on payment of costs even after execution levied and the money is in the sheriff's hands. *Lepens v. Barratt*, E. 39 G. 3. 222

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13. A writ, directed to the sheriff of *Northumberland*, may be served in *Newcastle-upon-Tyne*. *Busby v. Fearon*, E. 39 G. 3. Page 235
14. A plaintiff may sue in this court for a debt under 40 s., if he cannot sue in any inferior court. *ib.*
15. If a cause be made a remanet, it is not necessary to give a new notice of trial. *Jacks v. Mayer*, E. 39 G. 3. 245
16. But such new notice must be given when the trial has been put off to the next Sit-tings or Assizes by rule of court. *ib.*
17. If after issue joined and notice of trial given the plaintiff enter a suggestion on the roll and assign breaches under Stat. 8 & 9 W. 3. c. 11, he cannot deliver the second issue without a Judge's order. *Ether-ley v. Jackson*, E. 39 G. 3. 255
18. A warrant of attorney to enter up judg-ment having been given to A. who died in the vacation, the Court refused to let A's executor enter up judgment thereon in this term. *Cowie v. Allaway*, E. 39 G. 3. 257
19. Where bail are put in in due time, an exception must first be entered before the sheriff can be ruled to bring in the body; and the adding of bail afterwards does not supersede the necessity of such exception before an attachment can issue against the sheriff on account of the added bail not having justified in time. *R. v. The Sheriff of Middlesex*, E. 39 G. 3. 258
20. The Court referred it to the Master to compute what was due for principal and interest on a mortgage, in an action of cove-nant. *Berthen v. Street*, T. 39 G. 3. 326
21. After judgment by default in an action of covenant for non-payment of rent, the Court referred it to the Master to see what was due to the plaintiff. *Byram v. John-son*, M. 40 G. 3. 410
22. But a similar application was refused on an interlocutory judgment in debt on a judgment brought on a bill of exchange. *Nelson v. Sheridan*, M. 40 G. 3. 395
23. This Court will not discharge a defendant out of custody on filing common bail, on the ground that the plaintiffs at whose suit he was arrested were assignees under a com-mission of bankrupt sued out above three years ago against the defendant, under which they had received dividends., *Oliver v. Ames*, M. 40 G. 3. Page 364
24. But the Court suspended the execution of the rule on the sheriff to bring in the body to give the defendant time to make an ap-plication to the Lord Chancellor for relief. *ib.*
25. The plaintiff, having charged the defend-in execution, died; the defendant's wife took out administration to the plaintiff; then the Court ordered the defendant to be dis-charged out of custody, saying that the plaintiff's attorney had no lien on the judg-ment for his costs. *Pyne v. Erle*, M. 40 G. 3. 407
26. Plaintiffs cannot sue out a writ as execu-tors and declare in their own right. *Doug-las v. Irlam*, M. 40 G. 3. 416
27. When the rule to bring in the body expires the last day of term, the bail have the whole of the first day of the next term to justify; and if the defendant surrender in discharge of his bail on any part of that day the sheriff cannot be attached for not bringing in the body. *R. v. The Sheriff of Middlesex*. H. 40 G. 3. 464
28. If defendant suffer plaintiff to file com-mon bail for him under the statute, the latter may upon the expiration of the rule to plead sign judgment for want of a plea, without any demand of a plea. *Patt v. Rendle*, H. 40 G. 4. 465
29. Ancient demesne must be pleaded within the first four days of the term. *Denn v. Fenn*, H. 40 G. 3. 474
30. Where a prisoner files a plea as of a term prior to that wherein regularly he is called upon to plead, he must give notice to the plaintiff of such plea pleaded, otherwise the plaintiff may sign judgment as for want of a plea. *Parkinson v. Thompson*, T. 40 G. 3. 596
31. The plaintiff may sue out a writ against the bail, on their recognizance on the return day of the ca. sa. against the principal. *Shivers v. Brooks*, T. 40 G. 3. 628
32. *ib.*

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32. It is no objection to an affidavit that it was sworn before a commissioner who was employed as clerk to the attorney in the cause, in his character of clerk to the commissioners for the sale of the land tax. *Goodtitle d. Pye v. Badtittle*, T. 40 G. 3.

Page 638

33. The same persons who were bail in B. R. may justify again as bail upon a writ of error returnable in parliament. *Martin v. Justice*, T. 40 G. 3. 639

34. A declaration may be delivered against a prisoner in the vacation. *Heron v. Edwards*, T. 40 G. 3. 643

35. The Court will not refer it to the Master (after judgment by default) to compute what is due for principal and interest on an affidavit stating that the action is brought to recover the amount of a promissory note, unless it appear on the declaration that such is the cause of action. *Osborne v. Road*, T. 40 G. 3. 648

PREMIUM,

See INSURANCE, No. 8.

PRESCRIPTION,

See PRIVILEGE.

PRINCIPAL AND AGENT,

See PAYMENT, No. 1.

PRISON.

1. The house of correction for the county of *Middlesex*, adapted to the separate reception of felons, pursuant to the Stat. 22 Geo. 3. c. 64. and other acts, is a legal prison for the safe custody of persons under a charge of high treason. *Ex parte T. Evans*, H. 39 G. 3. 172

2. All the prisons in the kingdom are the King's prisons. *Ib.* 176

3. The hulks and penitentiary houses are appointed by particular statutes for particular descriptions of convicts. *Ib.* 177

PRIVILEGE,

See ATTORNEY. BANKRUPT, No. 10.
HOUSE OF LORDS. OFFICE, No. 5.

1. Where an immemorial privilege is claimed for all the officers of a court; and new officers are made within time of legal memory, they also fall within the privilege. *Wilkes v. Williams*, T. 40 G. 3. Page 631
2. The privilege of the officers of the court of Chancery to be impleaded in their own court, by proceedings in the Petty Bag Office, acknowledged. *ib.*

PRIZE,

1. The captain of a ship actually on board at the time of a capture is entitled to prize-money, though under arrest at the time, and though another officer be on board to take the command of the ship. *Lumley v. Sutton*, E. 39 G. 3. 224
2. Suspension from office does not deprive the officer from prize money. *ib.*

PROMOTION.

1. Mr. *Richards* had a patent of precedence. 182
2. Mr. *Vaughan*, made a Serjeant. *ib.*
3. Mr. *J. Le Blanc*, Judge of B. R. in the room of Mr. *J. Ashurst*. 259
4. Mr. *Lens* and Mr. *Bayley*, made Serjeants. *ib.*
5. Sir *John Scott*, Attorney General, created Lord *Eldon*, appointed C. J. of C. B. vice *Eyre*, Lord C. J. deceased. 421
6. Mr. *B. Chambre*, Baron of the Exchequer on the resignation of Mr. Baron *Perryn*. *ib.*
7. Sir *John Miford*, Solicitor General made Attorney General vice Lord *Eldon*. 422
8. Mr. *Grant C. J.* of *Chester* made Solicitor General and Knighted. *ib.*
9. Mr. *Mansfield* succeeded Mr. *Grant*, as C. J. of *Chester*. 422
10. Mr. *Park* appointed King's Counsel. *ib.*
11. Mr. *Best* made a Serjeant. *ib.*
12. Mr.

8 K

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12. Mr. Baron *Chambre* appointed a Judge of C. B. on the death of Mr. Justice *Buller*.

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13. Mr. *Graham*, Attorney General to the Prince of *Wales* succeeded Mr. Justice *Chambre* as a Baron of the Exchequer, and was knighted. *ib.*

14. Mr. *Gibbs*, King's Counsel and Solicitor General to the Prince of *Wales*, was made Attorney General to his Royal Highness. *ib.*

15. Mr. *Sutton* was appointed Solicitor General to the Prince. *ib.*

16. Mr. *Sutton*, Mr. *Alexander*, and Mr. *Romilly* were appointed King's Counsel. *ib.*

17. Mr. *Onslow* was made a Serjeant. *ib.*

PURCHASER.

Under a limitation in a marriage settlement the Court held that the wife took an estate tail; and though it was recited in the deed that the husband's father conveyed in consideration of the marriage and "for settling and establishing the lands &c. to the uses therein after expressed," and subsequent uses were added in the deed; yet a court of law would only take notice of the legal estate: and the husband and wife having levied a fine, and having agreed to sell the estate to a purchaser, from whom they had received part of the purchase money, the Court would not permit the purchaser to recover back the deposit money in an action for money had and received. *Apais v. Watkins*, *E.* 40 G. 3. 516

Q

QUALIFICATION,

See CONVICTION, No. 2. CORPORATION, No. 1. FREEMEN.

QUAY-PUBLIC.

1. Public quays are in the nature of public highways; the public have a right to the use of them; and also to the cranes erected thereon, paying what is customary for the same. *Bolt v. Stennett*, *T.* 40 G. 3. 606
2. In justifying (in a plea to an action of trespass) the use of a crane in a public wharf,

it is sufficient to say that it is "a public open and lawful wharf," without claiming the right by immemorial usage. Page 606

QUO WARRANTO, INFORMATION IN NATURE OF,

See CORPORATION. PLEADING, No. 14.

R.

RANSOM.

1. The statutes, prohibiting ransoms, being remedial acts are to be construed liberally. *Lovelock v. Rockwood*, *T.* 39 G. 3. 277
2. A ransom may take place on shore, in a neutral country, as well as on the high sea. *ib.*
3. It is not necessary that an hostage should be given to constitute a ransom. *ib.*

RATE,

See POOR-RATE.

RECOGNIZANCE,

See COSTS, No. 3.

1. Under the Stat. 5 G. 2. c. 19. s. 2. the party removing a conviction here by certiorari must enter into a recognizance with two sureties in the entire sum of 50*l.* *R. v. Durn*, *E.* 39 G. 3. 217
2. Their entering into a recognizance in 25*l.* each, is not a compliance with the directions of the Statute. *ib.*
3. Whether the party removing a conviction by certiorari under Stat. 5 Ann. c. 14. s. 2. should give a bond to the prosecutor for payment of costs &c.? *Qu. ib.* 218*n.*

REMOVAL FROM OFFICE.

1. A party must be summoned to answer to the charge before he is removed from his office. *R. v. Dr. Gaslin*, *E.* 39 G. 3. 209
2. And that fact must be stated in a return to a mandamus, to restore him. *ib.*
3. So it should appear in such a return that the body removing had proved the charge for which the party was removed. *R. v. The*

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The Faversham Fishermen Company, M.
40 G. 3. Page 352

4. It is not sufficient to state merely that he was present when the charge was made, and did not deny it. *ib.*

REMOVAL; ORDER OF.

1. An unmarried woman may be removed to the place of her settlement, on account of her being pregnant, under Stat. 35 G. 3. c. 101. s. 6., even though she be residing under a certificate from her own parish. *R. v. The Inhabitants of Great Yarmouth, M.* 39 G. 3. 68
2. If it do not distinctly appear on an order of removal that the justices who made it had jurisdiction, it is a nullity, and not merely voidable; and the parish, to which it is directed, may object to it at any distance of time though they never appealed against it, and though they have acted under it for twenty years. *R. v. The Inhabitants of Chilverscote, H.* 39 G. 3. 178
3. The Quarter Sessions can only amend an order of removal as to mere defects or wants of form, under stat. 5 G. 2. c. 19. *ib.* 181
4. If a feme covert be removed by an order of two justices from *A.* to *B.*, describing her as "*widow*," and there be no appeal against it, it is conclusive as to her husband's settlement as well as her own. *R. v. The Inhabitants of Rudgeley, T.* 40 G. 3. 620

REPAIRS,

See LANDLORD AND TENANT, No. 4.

ROGUE AND VAGABOND,

See COMMITMENT.

S.

SESSIONS,

See COSTS, No. 6. JURISDICTION, No. 4.

SET OFF.

1. The Court will permit the defendants to set off a judgment, recovered by them against the plaintiff, against a judgment obtained by the plaintiff against them, though the plaintiff may also have a separate demand on one of the defendants. *Glaister v. Haver, M.* 39 G. 3. 69

SETTLEMENT,

See REMOVAL, Order of. By APPRENTICESHIP.

1. An apprentice agreed with his master to purchase the remainder of his time, and that the indentures should remain with the master until payment of the sum stipulated, parish of which only was paid; before the expiration of the time he served another master in a different parish forty days by the recommendation of his original master; this was considered as a service under the indentures, and gave the apprentice a settlement. *R. v. The Inhabitants of Chipping Warden, H.* 39 G. 3. Page 10
2. A defective contract of apprenticeship cannot be converted into a contract of hiring and service so as to give the apprentice a settlement as a yearly servant by serving under it. *R. v. The Inhabitants of Laindon, M.* 40 G. 3. 379
3. Whether a contract be a contract of apprenticeship or of hiring and service must depend on the intention of the parties, which is to be collected from the whole of their agreement. *ib.*
4. The assent of two magistrates to a parish indenture is sufficiently signified by one of them first signing it alone and being afterwards present when the other signs it, so as to enable the apprentice to gain a settlement under it. *R. v. The Inhabitants of Winwick, H.* 40 G. 3. 454

SETTLEMENT,

— By Birth, and with Parents. —

A drummer under age entered into the same militia in which his father was serjeant, and lived with his father, the latter receiving the son's pay; held that a settlement gained by the father during such time was communicated to the son. *R. v. The Inhabitants of Woburn, H.* 40 G. 3. 479

SETTLEMENT,

See HIRING and SERVICE, No. 2, 3.

— By Certificate. —

A certificate granted by the parish of *A.* to the parish of *B.* acknowledging *C.* and *D.* his wife

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wife and their children to be their parishioners, is conclusive as between the parishes of *A.* and *B.*; though *D.* were not the legal wife of *C.* *R. v. The Inhabitants of Ullesthorpe, H. 40 G. 3. Page 465*

SETTLEMENT,

See SETTLEMENT by APPRENTICESHIP, No. 2.

—By hiring and service.—

1. The master, being obliged to leave his house seven days before the end of a year for which he had hired a servant, told the latter that he had no further occasion for her services, and paid her the whole year's wages; the master would otherwise have kept her, and she was unwilling to leave the service: held a dispensation with the service for the rest of the year. *R. v. The Inhabitants of St. Mary, Lambeth, E. 39 G. 3. 236*
2. If the son of a certificated person serve a year under a yearly contract in the parish granting the certificate, and then return under age to the father's house for a short time, and then serve another year with another master under a yearly hiring in the certificated parish, he does not gain a settlement in the latter parish. *R. v. The Inhabitants of Ingworth, M. 40 G. 3. 339*
3. If a parish certificate be granted to *A.*, and to *B.* and *C.* his children by name, the residence of *B.* and of his family in the certificated parish it protected by it; and a son of *B.* (not having been emancipated) cannot gain a settlement in the certificated parish by hiring and service. *R. v. The Inhabitants of Batheaston, H. 40 G. 3. 446*
4. In cases reserved from the sessions on this subject, the sessions should find as a fact whether in case of a hiring for a year and service short of that time the master dispensed with the service before the end of the year, or whether there were a dissolution of the contract by mutual consent. *R. v. The Inhabitants of St. Peter of Mancroft in Norwich, H. 40 G. 3. 477*
5. But in the above case, when before the end of the year the mistress asked the servant whether she chose to go away on a certain day (within the year) assigning as a reason that she had hired a new servant who

wished to come to her then, and the servant said it was immaterial to her, and agreed to go then, which she did, the Court thought that was evidence sufficient to find an agreement to dissolve the contract before the end of the year. *Page 477*

SETTLEMENT,

—By Marriage.—

If a feme-covert be removed by an order of two justices from *A.* to *B.*, describing her as "widow," and there be no appeal against it, it is conclusive not only as to her settlement, but also as to that of her husband. *R. v. The Inhabitants of Rudgeley, T. 40 G. 3. 620*

SETTLEMENT,

—By Office—

The pauper at an adjournment of a Court Leet holden 16th November 1792 was appointed to an annual office "for one year thence next ensuing or until he should be lawfully discharged;" which office he executed until the adjournment of another Court Leet holden 1st November 1793, held he did not thereby gain a settlement. *R. v. The Inhabitants of Bow, H. 40 G. 3. 445*

SETTLEMENT,

—By a Tenement of 10 l. per annum.—

1. A man had a tenement of 10 l. a year in *A.* in which he generally, and his wife and family constantly, resided for several years, but he occasionally slept in *B.* where he had another tenement under 10 l. a year, which he had lately taken for the more convenient carrying on of his business; upon the whole he slept more than forty nights, and particularly the last night, when his interest in both tenements ceased: held that he was settled in *B.* *R. v. The Inhabitants of St. Mary, Lambeth, E. 39 G. 3. 240*
2. The renting by a needle-maker of two out of six pointing places in another's mill, any two of which he was at liberty to use from time to time at 16 l. a year rent, and engaging also to do all his landlord's work in preference to that of others, for which he was to be paid by the piece, is not the tak-

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ing of a tenement within the Statute. *R. v. The Inhabitants of Dodderhill*, H. 40 G. 3.

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3. Where the pauper covenanted with the owner of a corn mill to deliver with his horses and carriages at his own charge from 1790 to 1795 at the owner's corn mill a certain quantity of wheat per week, and to grind and make the same into flour at his own (the pauper's) charge, and to pay to the mill owner at the rate of 8s. per load during the period mentioned: and the mill owner covenanted that the pauper should have the use and liberty of running and grazing for his horses on a certain meadow adjoining, and the use of the stable and cart house gratis: and the mill-owner also covenanted that he would at the end of the time agreed for again take all the utensils of the corn-mill at a fair appraisement, and the pauper ground corn at the mill under this agreement for three years residing in a cottage in the same parish: held this was not the taking of a tenement within the Statute, but a mere agreement to grind corn. *R. v. The Inhabitants of Hammer-smith*, H. 36 G. 3. 450 n.

SETTLEMENT OF ESTATE,

See LIMITATION.

SEWERS.

If a sea bank or wall, which the owners of particular lands are bound to repair, be destroyed by tempest, without any default in such owners, the commissioners of sewers may order a new one (even in a different form if necessary) to be erected at the expence of the whole level. *R. v. The Commissioners of Sewers, in Somersetshire*, T. 39 G. 3. 312

SHERIFF.

1. If the sheriff's gaoler discharge an insolvent debtor by order of the Quarter Sessions in a case where it turns out they had no jurisdiction, the sheriff is answerable in damages to the plaintiff at whose suit the insolvent was in custody. *Brown v. Compton*, H. 40 G. 3. 424
2. Though the sheriff appoint special bailiffs to arrest the defendant at the plaintiff's request, the sheriff is still responsible for the defendant after the arrest made. *Taylor v. Richardson*, E. 40 G. 3. Page 505

SLANDER,

See EVIDENCE, No. 3.

STATUTES CITED, OR COMMENTED UPON.

HENRY IV.

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- 13. c. 8. Usury. 391
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- 1. c. 15. Bankrupt. 149. 201
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— 37. c. 112. Insolvent debtors.	424
— 38. c. 40. Taxes.	468

STOCK JOBBING.

1. The Stat. 7 Geo. 2. c. 8., against stock-jobbing, does not extend to cases where the party agreeing to transfer is possessed of the stock. *Sanders v. Kemish, H. 39 G. 3.*
Page 162
2. And therefore where the plaintiff, being possessed of 3000*l.* 4 per cent. stock, empowered the defendant to sell the same for his own benefit, and in consideration thereof the defendant agreed to transfer at the next opening 3000*l.* 4 per cent. into the plaintiff's name, it was holden that the plaintiff might recover from the defendant, who failed to perform his engagement, the value of that stock on the day appointed for the transfer. *ib.*
3. A broker who contracts with others for the sale of stock at a future day by the authority of his principal, who afterwards refuses to make good the bargain, cannot by paying the difference to such third persons maintain an action on an implied assumpsit against his principal for the amount. *Child v. Moyley, T. 40 G. 3.* 610
4. If the principal were really possessed of the stock so bargained to be sold such contract is not illegal within the Stat. 7 Geo. 2. c. 8. against stock jobbing, although the broker did not disclose the name of his principal at the time of the bargain made; and the purchaser may maintain an action for the difference against the principal. *ib.*

SUBPCENA.

A subpcena may be issued from the Crown-Office, requiring a witness to attend at the assizes in the county to give evidence in support of an intended prosecution for felony: and B. R. will grant an attachment against him for disobedience thereto. *R. v. Ring, E. 40 G. 3.* 585

SUGGESTION,

See PLEADING, No. 4, 5.

SUNDAY,

See ATTACHMENT, No. 1.

TAXES

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T.

TAXES—EXEMPTION FROM,

The act of the 7 Geo. 3. c. 37. Exempting the owner of certain lands embanked from the river *Thames* from all taxes and assessments whatsoever, does not exempt the occupiers of houses built on such lands from the payment of the house and window duties imposed by stat. 38 G. 3. c. 40. *Perchard v. Heywood*, H. 40 G. 3. Page 468

TENANT,

See LANDLORD AND TENANT.

TENANT IN COMMON,

See ACTION ON THE CASE, No. 1, 2.

TENDER,

It is no answer to a plea of tender before the exhibiting of the plaintiff's bill, that the plaintiff had before such tender retained an attorney and instructed him to sue out a writ against the defendant, and that the attorney had accordingly applied for such writ before the tender, which writ was afterwards sued out. *Briggs v. Calverly*, T. 40 G. 3. 629

THAMES,

See TAXES.

1. It is only necessary to have a regular pilot (under stat. 5 Geo. 2. c. 20.) when a vessel is sailing on the *Thames* in the course of her navigation. *R. v. Neale*, E. 39 G. 3. 241
2. When the vessel has finished her voyage, any other person may remove her from one part of the river to another. *ib.*

TITHES,

See PLEADING, No. 1, 2.

TOLL,

See POOR-RATE, No. 1, 2.

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See ASSUMPSIT, No. 1.

TRADING WITH ENEMIES,

See INSURANCE, No. 14.

TRESPASS,

See ACTION ON THE CASE, No. 3, 4. EVIDENCE, No. 7. PLEADING No. 1, 2, 3. 12. 19.

TRUST-DEED.

1. A deed of trust conveyed the lease of a farm from all the grantor's effects and all debts due to him to trustees, in consideration of a certain sum to be paid to him by one of the trustees, in trust to dispose of all the property, and out of the produce to reimburse the trustee the sum advanced by him to the grantor, and all other the trustee's demands upon him, and then to pay all such debts as were justly due from the grantor, as the trustees in their discretion should think proper, the surplus to be holden for the benefit of the grantor's wife (whose property the bulk of it originally was) as a separate maintenance for her, in consequence of a separation between them on account of her husband's ill usage. Held that such deed was not fraudulent or void as against creditors, it appearing to have been made bona fide at the time, and that all the creditors of the grantor known at the time had upon application to the trustees received payment of their debts. *Nunn v. Wilsmore*, E. 40 G. 3. Page 521
2. Held also that the wife was not liable as executrix de son tort after the death of her husband intestate on account of her possession of this property under the deed of trust. *ib.*

U.

UNIVERSITY,

See EVIDENCE, No. 5.

USE AND OCCUPATION.

If *A.* agree to let lands to *B.*, who permits *C.* to occupy them, *A.* may recover the rent in an action against *B.* for use and occupation. *Bull v. Sibbs*, T. 39 G. 3. 327

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USURY.

1. If *A.* for an usurious consideration give his promisory note to *B.*, who transfers it to *C.* for a valuable consideration without notice of the usury, and afterwards *A.* gives a bond to *C.* for the amount, the bond is good. *Cuthbert v. Haley, M. 40 G. 3. Page 390*
2. But if *A.* had given *B.* his bond in consideration of such note, the bond would have been void. *ib.*

VAGRANT,

See WARRANT.

VOID AND VOIDABLE,

See REMOVAL, Order of, No. 2.

W.

WAGER,

See ASSUMPSIT, No. 8.

WARRANT.

1. A commitment in execution of a rogue and vagabond under Stat. 23 Geo. 3. c. 88. should state that the defendant was apprehended with the implements of housebreaking upon him *at the time of such apprehension* &c. *R. v. Brown, M. 39 G. 3. 26*
2. A warrant to arrest the party, "to the end that he may become bound &c to appear at the next Sessions &c." means the next sessions after the arrest and not after the date of the warrant. *Mayhew v. Parker, H. 39 G. 3. 110*

3. Therefore the officer, who executes such a warrant, may justify an arrest after the sessions next ensuing the date of the warrant. *Page 110*

4. An officer, to whom a warrant is intended to be directed, cannot arrest the party before he has the warrant. *Hali v. Reche, E. 39 G. 3. 187*

5. If he do, the Court will discharge, the defendant out of custody. *ib.*

6. Whether the officer be not bound to produce the warrant to the party arrested, if it be demanded? *Qu. 188*

WARRANT OF ATTORNEY,

See AWARD, No. 5, 6, 7. PRACTICE, No. 18.

WASTE,

See ACTION ON THE CASE, No. 1, 2.

WAY, RIGHT OF,

See HIGHWAY.

1. If *A.* convey land to *B.* to which there is no access but over *A.*'s land, a right of way passes of necessity as incidental to the grant. *Howton v. Frearson, M. 39 G. 3. 50*
2. So if *A.* convey as a trustee. *Ib. 56*
3. If the owner of two closes, having no way to one of them but over the other, part with the latter without reserving the right of way, it will be reserved for him by operation of law. *ib.*

WILL,

See DEVISE. EVIDENCE, No. 1, 2.

WITNESS,

See ATTACHMENT, No. 2. OF SUBPOENA.



THE END OF THE EIGHTH VOLUME.

